SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 540

JULIA ROSADO, *ET AL.*,

Petitioners,

- against -

GEORGE K. WYMAN, ETC., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

A. RELEVANT DOCKET ENTRIES

1969, April 9th: Complaint filed. Summons issued.

1969, April 10th: By Weinstein, J. Order To Show Cause filed with proof of service thereon why a preliminary injunction should not be granted enjoining defendant Wyman, etc., from taking any steps toward implementing and from putting into effect the system of "maximum monthly grants" and schedules of need prescribed by N.Y. Social Services Law Sec. 131-a, etc. (returnable April 15, 1969 at 10:00 A.M.)

1969, April 15th: Motion and memorandum of law filed, to convene three-judge court. 4/15/69

1969, April 15th: Before Weinstein, J. – Motion for preliminary injunction etc. adjd to Apr. 18, 1969 at 2:00 P.M.

1969, April 15th: By Weinstein, J. – copy of telegraphic message sent to Hon. Robert Finch, Secty H.E. – & W. Washington, D.C. re: preliminary hearing set for 2:00 P.M. Friday, April 18, 1969, filed.

1969, April 15th: By Weinstein, J. – Copy of telegraphic message sent to Hon. John Mitchell, Atty Gen., Washington, D.C. re: preliminary hearing set for 2:00 P.M. April 18, 1969 filed.

1969, April 18th: Before Weinstein, J. – Hearing on motion to convene three-judge Court – Court grants leave to defts to move to implead U.S.A. as a party deft – if papers are served no later than 5:00 P.M. April 21, 1969. Hearing continued to April 23, 1969 at 2:00 P.M.

1969, April 23rd: Before Weinstein, J. – Hearing on motion for preliminary injunction etc. resumed – Motion to dismiss as to National Welfare Organization and City-Wide Co-ordinating Commission for lack of standing – Case now to be captioned Rosado v. George K. Wyman – Motion granted – Motion by State of New York to bring in the Health Welfare and Education as a party deft – Motion

denied – Hearing continued to April 24, 1969 at 12:00 Noon.

1969, April 23rd: By Weinstein, J. – Memorandum & Order filed (Standing of Organizations) Defts' motion to dismiss as to the two Organizational pltffs for lack of standing is granted. The Clerk is directed to strike the National Welfare Rights Organization and Citywide Coordinating Committee of Welfare Organizations from the caption of this case. Henceforth, this case should be referred to as Rosado, et al. v. Wyman, et al. 69-C-355. So ordered. (See opinion & order)

1969, April 23rd: By Weinstein, J. – Memorandum & Order (Necessary party) filed. Decision rendered, Defts' motion to join H.E.W. as a necessary and indispensable party is denied. So Ordered. (See memo and Order)

1969, April 24th: Before Weinstein, J. – Hearing on preliminary injunction etc. Findings of fact were read into record by the Court – and renders its decision – Temporary restraining order granted – and granting motion for 3 judge Court – Temporary restraining order in effect until 3 Judge Court convenes – Court will file findings of fact and order – Hearing concluded.

1969, April 24th: By Weinstein, J. –Temporary Restraining Order filed. It is ordered that, pending hearing and determination by a statutory three-judge court deft Wyman etc. are hereby restrained etc.

1969, April 24th: Copy of letter to Judge Lumbard from Judge Weinstein dated April 24th, 1969 re: recommending appointment of a three-judge Court. filed.

1969, April 24th: By Weinstein, J. – Memorandum & Order – Three-Judge Court and Temporary restraining order. filed. Decision rendered, the defts' motion for the convening of a three-judge court and pltffs' motion for temporary restraining order are granted. Defts and pltffs are advised to have their papers seeking summary judgment and all other relief served and filed on April 29, 1969. The parties

are granted until May 2, 1969 to submit reply papers and briefs. All undecided motions will be referred to the three-judge court. SO ORDERED. (P/C mailed to attys)

1969, April 25th: By Lumbard, Ch Judge U.S. Court of Appeals, designating Hon. Jack B. Weinstein, to hear and determine said cause: Hon. Leonard P. Moore, Hon. Jacob Mishler. SO ORDERED. (P/C mailed to attys) (copy of order sent of Judge Mishler, Judge Weinstein, and mailed to Judge Moore)

1969, April 25th: Motion filed to join additional party.

1969, April 28th: Letter to Judge Weinstein, from U.S. Dept. of Justice, dated April 23, 1969 filed.

1969, April 30th: Motion filed pursuant to Rule 56, and defts' memorandum of law for summary judgment in favor of defts etc.

1969, April 30th: Answer of defts filed.

1969, April 30th: Motion and pltffs' memorandum filed pursuant to Rule 56, for summary judgment in favor of pltffs and for a permanent injunction etc.

1969, May 2nd: Supplemental statement as to material facts filed.

1969, May 2nd: Before Moore, C.J. – Mishler, J. – Weinstein, J. – Hearing on motion for summary judgment held. Motion argued – Decision reserved.

1969, May 12th: By L. P. Moore, C. J. – Mishler, J. – Weinstein, J. – Memorandum & Order filed. It is ordered that the three-judge court heretofore convened be and is dissolved and that the matter be and is remanded to the single judge to whom the complaint was originally presented for such further proceedings as are appropriate. SO ORDERED. (See memo & order) (P/C mailed to attys)

1969, May 12th: By Weinstein, J. – Memorandum & Order filed. The three-judge court in this action has been dissolved etc. Since the order issued on April 24, 1969, etc. is no longer in force, a new temporary restraining order in iden-

tical terms will be issued pursuant to Rule 65 etc. So ordered. (See memo and order) (P/C mailed to attys)

1969, May 12th: By Weinstein, J. – Temporary Restraining Order filed, etc.

1969, May 15th: Copy of letter to Hon. L. P. Moore, Mishler, J. Weinstein, J., from Center on Social Welfare by Lee A. Albert dated May 6, 1969.

1969, May 15th: By Weinstein, J. – Memorandum & Order filed, for decision on summary judgment & temporary injunction. Parties will submit proposed orders for a preliminary injunction by 4:30 P.M. on Fri. May 16, 1969. (See memo and order)

1969, May 16th: By Weinstein, J. Order filed pursuant to this Court's Order & Memo of May 15, 1969 the temporary restraining order is incorporated in and shall be a preliminary injunction adopted pursuant to Rule 65 preliminary injunction is effective until final decision on the merits of this case. Pltff shall file security in the sum of $1,000.00. Defts motion for a stay of this preliminary injunction is denied (see order attached on file of May 12, 1969) (P/C mailed to attys)

1969, May 19th: Notice of Appeal filed

1969, June 18th: State administrative materials promulgated pursuant to section 131-a submitted by pltffs on June 10, 1969 filed.

1969, June 18th: Before Weinstein, J. – Hearing on motion for summary judgment held and concluded – Court's oral findings of fact and conclusions of law – Motion for summary judgment granted to pltffs – Enjoins defts from implementation of Sec. 131a of the Social Service Law as amended – Denied defts' motion for a stay of permanent injunction – Order on oral decision and findings of fact as modified orally to take effect immediately – Court denied the stay in all respects upon application by defts. Pltffs to submit an order for signature at 4:30 P.M. in accordance with Judge's decision – Court directed defts to file a notice

of appeal before 4:30 P.M. (June 18, 1969) in accordance with defts objections in the judge's findings.

1969, June 18th: By Weinstein, J. – Memorandum & Order filed. Pltffs' motion for summary judgment is granted. SO ORDERED. (See opinion and order) (P/C mailed to attys)

1969, June 18th: By Weinstein, J. – Order Filed, that deft Wyman, his successors in office, etc., are hereby enjoined from implementing or utilizing said Sec. 131-a and, pursuant thereto, from denying, reducing or discontinuing any benefits in the form of either regular recurring grants or special grants now available to receipents of Aid to Families with Dependent Children in New York (including the quarterly "flat grant" in New York City and special grants throughout the State). This order shall take effect immediately.

1969, June 18th: By Weinstein, J. – This order is stayed until 4:00 P.M. on June 19, 1969. SO ORDERED. (Order endorsed at foot of above order) (P/C mailed to attys)

B. COMPLAINT (Document No. 1)

UNITED STATES DISTRICT COURT
Eastern District of New York

National Welfare Rights Organization, Citywide Coordinating Committee of Welfare Organizations, and Julia Rosado, Lydia Hernandez, Majorie Miley, Sophia Abrom, Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Majorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated, Plaintiffs,

- against - 69 Civ 355

George K. Wyman, individually and in his capacity as Commissioner of Social Services for the State of New York, and the Department of Social Services for the State of New York, Defendants.

I

Plaintiffs on behalf of themselves and all other persons similarly situated seek to have this court declare invalid reductions in the amounts of public assistance grants mandated by New York Social Services Law § 131, as amended Laws Ch. 184, March 31, 1969, and § 131-a, added Laws Ch. 184, March 31, 1969 (set forth in Exhibit A herein), and to enjoin said reductions, on the ground that such reductions are inconsonant with the Social Security Act, 42 U.S.C. §§ 301 *et seq.* and the regulations promulgated thereunder.

In addition, plaintiffs seek a declaration that the aforesaid Sections 131 and 131-a are in violation of the Fourteenth Amendment to the Constitution of the United States insofar as said sections have the effect of denying equal protection of the law.

II

PRELIMINARY STATEMENT

On March 29, 1969 the Legislature of the State of New York enacted § 131-a which reduces by significant amounts the "standards of need" and actual grants to be paid to public assistance recipients in New York, as hereinafter more fully set forth. Such reductions were made pursuant

to express legislative findings in the Act of a "spiraling rise of public assistance rolls and the expenditures therefor," the "economic concern of the people of the State of New York," and the necessity for the legislature to set "the costs of delivering the needs of public assistance recipients in the respective social services districts of the states." Law Ch. 184, § 1, March 31, 1969.

The aforesaid standards and maximum grants will be fully impemented on July 1, 1969. On the same date, adjustments upwards of standards and grant maximums, based upon the rise in the cost of living, are required to become fully operative under Section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23) [hereinafter sometimes referred to as Section 402(a)(23)]. This federal law, which was enacted January 2, 1968, requires that the standards and maximums then in effect be increased by July 1, 1969 while the New York statute requires the opposite result.

The New York Act is in direct conflict with the requirements of federal law, denies recipients of public assistance in New York the protections and entitlements afforded them by federal law, and causes serious and irreparable harm to said recipients. Moreover, as hereinafter more fully set forth, the New York requirements unreasonably and irrationally limit standards and maximums of grants to recipients who reside in Nassau County and elsewhere outside of New York City to levels significantly lower than those applicable to recipients who reside in New York City despite similarity in living costs. The latter distinctions violate federal statutory requirements mandating uniform standards of need and maximum grants throughout the state, set forth hereinafter and, additionally, the Equal Protection Clause.

III

Jurisdiction

The jurisdiction of the Court is based upon:

(a) 28 U.S.C. §§ 1331, 1337 and 1343.

(b) 28 U. S. C. §§ 2201 and 2202.

(c) 42 U.S.C. §§ 1983 and 1988.

(d) United States Constitution, Article VI and the Fourteenth Amendment.

The amount in controversy, exclusive of interests and costs, exceeds $10,000.

IV

Statement of Claim

1. Pursuant to the Social Security Act of 1935, 42 U.S.C. §§ 301 et seq., New York cooperates with the Federal Government in providing public welfare assistance to needy persons under a New York "state plan," consisting of state statutes and regulations and approved by the United States Department of Health, Education and Welfare. In order to participate in said program New York must comply with all pertinent federal statutes and regulations.

2. Pursuant to the state plan, eligible individuals receive regular recurring semi-monthly or monthly checks for food, rent and other items of basic subsistence.

3. Prior to September 1968, all recipients in New York State were also eligible for "special needs" grants to provide for lacking, deteriorated or outgrown items of furniture, clothing, kitchen supplies, and other items. The

provision for such grants recognized that the "regular and recurring" grant did not provide sufficient monies to recipients to permit them to purchase or replace the needed items which were the subject of the "special needs" grants.

4. Among other things, the "special needs" grants provided monies for the purpose of:

(a) Supplying families with an amount for home furnishing and clothing consistent with a minimal standard of health and decency at the time a family began receiving public assistance and from time to time thereafter.

(b) Replacing essential items of home furnishings and clothing as they became worn out, unsafe, or a hazard to health.

(c) Providing for telephones for those persons demonstrating medical or other necessity, special diet requirements pursuant to doctor's orders, restaurant meals for those unable to cook at home, travel for welfare and medical business, layette for newborn infants, job-hunting expenses, school fees, burial expenses, and so forth.

5. On August 27, 1968, as the result of a substantial increase in special needs grants in New York City because of proper payments for legitimate needs, the City effectuated under the guise of a "demonstration project," a substantial reduction in its expenditures and in the amounts paid to many needy families by eliminating all special needs grants for clothing and household furnishings and providing instead a "special flat quarterly grant" totaling $100 per year per recipient allegedly to cover the cost of such items. Said "special flat quarterly grant" is an addition to the "regular and recurring" grant. Recipients continued to remain eligible for grants for the items of special need enumerated in paragraph (4)(c) above.

6. The so-called "special flat quarterly grant" at no time applied to persons residing in counties of New York State other than those constituting the City of New York. Recipients outside of New York City continued to be eligible for all special needs grants. Thus plaintiffs herein Duffy and Phillips continued to receive grants for special needs under existing § 131 of the Social Services Law.

7. On or about March 29, 1969, the New York State Legislature, which had previously authorized the State Department of Social Services to establish grant levels, adopted Social Services Law § 131-a and set its own standards of need and maximum grants, exclusive of rent and fuel, for persons living in New York City as follows:

Number of persons in Household

One	Two	Three	Four	Five	Six	Seven	For each additional person
$70	$116	$162	$208	$254	$297	$340	$43

and the following standards of need and maximum grants for recipients outside of New York City:

Number of persons in Household

One	Two	Three	Four	Five	Six	Seven	For each additional person
$60	$101	$142	$183	$224	$257	$290	$33

As the result of this enactment, the amount for which plaintiffs qualified under law are substantially reduced, as is demonstrated in the tabulation set forth subsequently herein. These reduced "maximum monthly grants" will become effective July 1, 1969, and the New York State

Department of Social Services is now taking the appropriate administrative steps to allow for effective and complete implementation throughout the State by July 1, 1969

8. By adopting Section 131-a, the Legislature lowered the standards and significantly reduced the grants available to recipients in the following way, among others:

(a) Cost of living increments which had been added to the "regular and recurring" grants subsequent to the enactment of Section 402(a)(23) in January, 1968 are wiped out for numerous families, and the families reduced below standards existing in July 1967.

(b) The "special flat quarterly grant" for New York City residents is abolished.

(c) All "special needs" grants for recipients living anywhere in New York State are eliminated.

(d) Recipients living in certain places outside the City of New York, such as Plaintiffs Duffy and Phillips who reside in Nassau County and who presently receive "regular and recurring" grants equal to those living in New York City because of equally high or higher living costs, are even further reduced in the standards and grants.

9(a) On January 2, 1968, the Social Security Act was amended by the addition of Section 402(a)(23), which in its entirety requires that the States:

> "provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

(b) The United States Department of Health, Education and Welfare has adopted the following regulation pursuant to Section 402(a) (23):

> "In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3) (viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards." 45 C.F.R. § 233.20(a) (2) (ii), 34 Fed. Reg. 1394 (1969).

(c) Section 402(a) (23) imposes two discrete obligations on the states and contemplates a necessary two-step operation by the States to bring about the mandated results on July 1, 1969. (1) The States shall take the necessary steps so that standards of need "will have been" adjusted to reflect fully changes in living costs. (2) "maximums that the state imposes on the amount of aid paid . . . will have been proportionately adjusted." Recognizing that an adjustment in standards of need in light of changes in cost of living necessarily requires study and analysis of changes in living costs and that the adjusted standard resulting from such study and analysis requires state legislative change and substantial administrative adjustment. Congress provided the period from January 1968 to July

1969. Congress therefore mandated immediate preparation of adjustments in the standards used to determine need so that by July 1, 1969, the amounts paid to families with dependent children would reflect fully changes in living costs since the state standard had last been adjusted prior to January 2, 1968, when Section 402(a) (23) became law.

(d) The cost of living in the New York City Metropolitan area (including Nassau County) has risen 7.7% from July 1967, the last date prior to January 2, 1968, when welfare benefits were increased by New York, until February 1969. Section 131-a effectuates a substantial reduction, however, rather than the federally mandated increase.

(e) New York has taken final legislative action in enactment of its annual budget for the fiscal year 1969-1970 which offends the two federal requirements in Section 402(a) (23). Ignoring the applicable 7.7% increase in living costs, New York has redetermined the needs of individuals downwards during the very period of federal obligation in which the State must adjust need standards to reflect fully changes in costs of living. Based upon this unlawful redetermination of needs of individuals, New York has further mandated dollar maximums on the amounts of aid to be paid as of July 1, 1969, when the federal statute requires that any such maximums will have been proportionately adjusted to reflect the rise in living costs. In so doing New York has mandated a result to obtain on July 1, 1969, flatly contrary to the result specified in Section 402(a) (23) for that very date.

(f) New York has until now determined on some allegedly factual basis the needs of various families and then paid that family the amount needed, taking into account other resources of the family such as earned income and

OASDI benefits. On information and belief, no factual study or attention to actual need whatever underlay the setting of the "maximum monthly grants" by the legislature, although the statute says that "such schedules shall be deemed to make adequate provision for all items of need." Rather the sole concern of the legislature was the "costs of delivering the needs of public assistance recipients," in light of the "spiraling rise of public assistance rolls and the expenditures therefore. . . ." Laws Ch. 184, § 1, March 31, 1969.

10(a) United States Department of Health, Education and Welfare regulation requires that state plans must:

> "Provide that the standard [of assistance] will be uniformly applied throughout the State." 45 C.F.R. § 233.20(a)(2)(iii), 311 Fed. Reg. 1394 (Jan. 29, 1969) and
>
> "Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly State-wide." 45 C.F.R. § 233.20(a)(2)(viii), 311 Fed. Reg. 1394 (Jan. 29, 1969).

(b) The standards of assistance and maximum grants adopted by the Legislature in Section 131-a do not apply uniformly, nor are the discriminations in amounts granted based on any rational consideration of living costs. For example, the living costs of plaintiffs and their class who are residents of Nassau County are as high or higher than those experienced by residents of New York City and public assistance grants to them were equal.

11. The current standard of assistance falls far short of that necessary to maintain health and decency, as all

studies of this field confirm. The individuals and families on public assistance who now live from hand to mouth are now being buffeted by spiraling inflation and an increase in the regressive sales tax. The reductions described herein threaten profound irreparable injury in that the reduced grants do not provide plaintiffs and their class with the amount needed to subsist. This induces recipients to cut back on current expenditures to save against the decline in assistance grants as costs rise.

12. The reduction in the standard of need will render ineligible for aid needy persons whose income and other resources were just below welfare standards and will now equal or exceed the reduced standard.

13. Unless this Court declares the reduction invalid and enjoins the implementation thereof, the aforementioned unlawful result will obtain on July 1, 1969, and the Legislature will be unable to act in timely fashion to comply with the requirements of Section 402(a)(23).

V

Plaintiffs

1.(a) Plaintiffs are all citizens of the United States and reside in the State of New York. Plaintiffs bring this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all New York individuals and families similarly aggrieved by the unlawful reduction of public assistance grants pursuant to Section 131-a of the New York Soical Services Law in violation of the Social Security Act and federal regulations.

(b) Plaintiffs Duffy and Phillips are members of an additional class of recipients of public assistance residing

in Nassau County, and other urban and suburban counties other than those within the City of New York, whose grants have been reduced below those of persons with identical need in the City of New York in violation of the Social Security Act and regulations promulgated thereunder, and the Fourteenth Amendment to the Constitution of the United States.

(c) Plaintiffs bring this action as a class action because the questions of fact and law are common to the plaintiffs and the class they represent, the members of the class are so numerous as to make joinder of parties impracticable, the claims of the plaintiffs are typical of the claims of all members of the class, the plaintiffs fairly and adequately represent the claims of all the members of the class, the defendant is acting on grounds generally applicable to the entire class, the questions of law and fact common to the class predominate over any questions affecting individual members, and class action will best provide for a fair and efficient adjudication of this controversy.

2. The New York City Plaintiffs are presently receiving regular monthly amounts for AFDC as set forth below and are prohibited from receiving more than the following amounts under the challenged statute. All amounts are exclusive of rent.

Plaintiff	*Current Monthly Grant*	*Maximum Grant Under § 131-a*
Rosado	$280	$254
Hernandez	$218	$162
Miley	$535	$469
Abrom	$406	$340
Gathers	$382	$340
Lowman	$396	$383
King	$482	$426
Folk	$337	$208

3. The Nassau County Plaintiffs are presently receiving the following amounts exclusive of rent. Needy individuals in Nassau County presently receive assistance at the same levels as individuals in New York City. Under the challenged law these plaintiffs will receive assistance at the lower rates provided for all recipients residing outside New York City.

Plaintiff	*Current Monthly Grant*	*§ 131-a NY State Maximum*	*§ 131-a NY City Minimum*
PHILLIPS	$314.40	$224	$254
DUFFY	$563.40	$389	$469

4. Plaintiff National Welfare Rights Organization was formed in 1967 by recipients of public assistance to enable them to learn of their rights and entitlements and to organize and to teach individuals in need of financial assistance how they might go about getting the needed relief. The membership of NWRO includes more than 30,000 households, and 200 affiliated groups in 70 communities in 37 states.

5. Plaintiff City Wide Coordinating Committee of Welfare Organizations was formed in 1966 by welfare recipient for the purpose of assisting all needy individuals to receive the grants to which they are legally entitled. City-wide is the coordinating agency for neighborhood welfare organizations in New York City and it has over 4,000 members.

VI

DEFENDANTS

1. The Defendant State Department of Social Services, under New York Social Services Law § 20, has primary

responsibility for promulgating regulations and instituting procedures for the administration and distribution of public assistance in New York State, in accordance with the requirements of the federal Social Security Act, the Social Services Law of New York, and the Constitutions of New York and the United States.

2. Defendant George K. Wyman, as Commissioner of the Department of Social Services of the State of New York, has primary responsibility for the administration of that Department in compliance with the law. New York Social Services Law, § 34.

VII

As a first cause of action, plaintiffs allege:

1. Section 402(a)(23) of the Social Security Act requires that:

> ". . . by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established . . ."

2. By enacting Section 131-a, New York State has set standards which are "deemed to make adequate provisions for all items of need. In fact this legislation constitutes a downward revision in standards in direct violation of Section 402(a)(23) and therefore should be declared invalid and defendants should be enjoined from implementing such reduction for plaintiffs and members of their class, pursuant thereto.

VIII

As a second cause of action, plaintiffs allege:

Complaint (Document No. 1).

1. Section 402(a)(23) of the Social Security Act provides that:

> ". . . by July 1, 1969, . . . any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted [to the cost-of-living increase]."

2. Section 131-a, in adjusting maximums on the amounts paid to plaintiff families, in accordance with redeterminations of need which reflect anything but "changes in living costs," thereby reducing actual benefits paid, is in direct violation of Section 402(a)(23) and therefore should be declared invalid and defendants should be enjoined from implementing such reduction of benefits pursuant thereto.

IX

As a third cause of action, plaintiffs allege:

1. The regulations of the Department of Health, Education and Welfare, 45 C.F.R. § 233(a)(2)(ii), 34 Fed. Reg. 1394 (1969) provide that in making the cost-of-living adjustment

> ". . . a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. . . ."

2. Section 131-a constitutes such a forbidden "reduction in the content of the standard," in that it eliminates provision for major items of clothing and furniture which is now made through special needs grants outside New York City and the $100 per year "special flat quarterly grant" in New York City. Amounts contained in the regular recurring grant to provide for the greater expenses of feeding and clothing older children are also eliminated.

Grants available throughout the State for telephones, special diets, expenses incident to employment, age, disability, pregnancy, education and training, replacement of lost or stolen checks, moving expenses, rent security, extermination, etc., are now impermissible.

3. Section 131-a is indirect violation of the federal regulation and therefore should be declared invalid and defendant should be enjoined from implementing a reduction of benefits pursuant thereto.

X

As a fourth cause of action, plaintiffs allege:

1. Section 131-a violates the Social Security Act of 1935 and the regulations made pursuant thereto because it is not a plan of uniform statewide application in that public assistance recipients in Nassau County and other non-New York City areas are singled out for special, unfavorable and discriminatory treatment.

2. Section 402(a)(1) of the Social Security Act, 42 U.S.C. § 602(a)(1), requires that a state plan "shall be in effect in all political sub-divisions of the state, and, if administered by them, be mandatory upon them." As interpreted by the Department of Health, Education and Welfare in its "Handbook of Public Assistance Administration" (the binding federal regulations of the United States Department of Health, Education and Welfare), the statute requires that the plan "shall . . . provide for administration in accordance with standards that are mandatory and equitable throughout the State." Pt. II § 4200(1) (1964).

3. On January 29, 1969 the Department of Health, Education and Welfare promulgated 45 C.F.R. § 233.20, 34 Fed. Reg. 1394, which provides in pertinent part:

> § 233.20 Need and Amount of Assistance
>
> a) *Requirement for State Plans.* A State Plan for OAA, AFDC, AB, APTD OR AABD must, as specified below:
>
> 1. *General.* Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis. . . .
>
> 2. *Standards of Assistance.* (i) Specify a Statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.
>
> • • •
>
> (iii) Provide that the standard will be uniformly applied throughout the State.

4. Although the legislative findings and purpose of the March 29, 1969 Act state that the reductions "will promote greater uniformity and equality of treatment," plaintiffs Phillip and Duffy, both residents of Nassau County, will receive substantially less public assistance under Section 131-a than persons identically situated but living within New York City.

5. The cost of living in Nassau County is as high as in New York City. The United States Department of Labor in its statistical analysis of the cost of living makes no distinction between costs in New York City and neighboring counties. The same supermarket chains and department stores service both areas and charge substantially

the same prices for all items including basic necessities in both New York City and Nassau County.

6. Defendant Wyman recognized this absence of cost of living differential in promulgating Section 352.4 of Title 18 of the New York Code, Rules and Regulations which established identical standards of need for public assistance recipients living in New York City and Nassau County.

7. On information and belief, there was neither experience, information or evidence brought before either house of the New York State legislature or any committee thereof justifying or warranting a legislative finding that there was an actual cost of living differential between New York City and Nassau County.

8. Section 131-a is in direct violation of the federal requirement that standards will be uniformly applied throughout the State, in that it sets different and lower standards for residents of Nassau County and elsewhere without regard to their equal need, and therefore should be declared invalid and defendants should be enjoined from implementing a reduction of benefits pursuant thereto.

XI

As a fifth cause of action, plaintiffs repeat and reallege the allegations contained in counts one through four hereof with the same force and effect as if herein fully set forth, and allege:

1. Section 131-a has set schedules of grants and "deem[s]" them "to make adequate provision for all items of need." This was done for the sole purpose of saving money without regard to the actual cost of living in

the State and without consideration of objective studies which are required by the various federal regulations previously set forth.

2. Section 131-a is in direct violation of the requirements of the Social Security Act and the regulations adopted thereunder, and therefore should be declared invalid and defendants should be enjoined from implementing a reduction of benefits pursuant thereto.

XII

As a further claim for declaratory relief, plaintiffs Phillips and Duffy, on behalf of all members of their subclass residing in Nassau County repeat and reallege the allegations contained in count four herein with the same force and effect as if herein fully set forth, and allege:

1. There is no legitimate or rational purpose served by discriminating against public assistance recipients living outside of New York City, and more particularly in Nassau County.

2. Section 131-a denies plaintiffs Phillips and Duffy and all members of their sub-class the equal protection of the laws in violation of the Fourteenth Amendment and therefore should be declared invalid.

XIII

Plaintiffs have no adequate remedy at law. Defendant will continue to cause, and threaten to cause, irreparable injury unless enjoined forthwith.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated, that this Court:

1. Enter preliminary and permanent injunctions enjoining the defendant, his successors in office, agents and em-

ployees, and all other persons in active concert and participation with them, from enforcing or taking any steps in any way toward implementing, and from putting into effect, the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, added by Laws Ch. 184, March 31, 1969, on the ground that said grants and schedules are in violation of and inconsistent with the requirements of the federal Social Security Act and regulations promulgated thereunder.

2. Enter a declaratory judgment holding that the said New York Social Services Law § 131-a violates the federal Social Security Act and regulations promulgated thereunder and is therefore invalid in that it redetermines need standards downward rather than upward in accordance with changes in living costs as required, creates maximums which decrease rather than increase the amounts paid to families, and contracts the content of the standard of need, and sets standards without objective study.

3. Enter a declaratory judgment holding that New York Social Services Law § 131-a denies plaintiffs residing in the Greater New York area but outside the City of New York rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States, the federal Social Security Act and regulations promulgated thereunder, insofar as the said Section 131-a reduces benefits for persons in the greater New York City area but outside the City of New York even further than for City residents despite the similarity in needs and cost of living for the two groups of recipients.

4. Allow plaintiffs their costs herein and grant them and all other persons similarly situated such additional or alternative relief as the Court may deem to be just and appropriate.

* * * * * *

C. ORDER TO SHOW CAUSE (Document No. 3)

[Title Omitted in Printing]

Let Defendants show cause in Courtroom No. 10 of the United States Courthouse, 225 Cadman Plaza East, Brooklyn New York, on the 15th day of April 1969, at 10:00 a.m. or as soon thereafter as counsel may be heard, why a preliminary injunction should not be granted enjoining defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them, from taking any steps toward implementing and from putting into effect the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, added by Laws Ch. 184, March 31, 1969, on the ground that implementation of such system and schedules will result in reduction of benefits in violation of Section 402 (a) (23) of the federal Social Security Act, 42 U.S.C. 602 (a) (23), and related sections, and regulations promulgated thereunder.

Plaintiffs have alleged that they are suffering, and are threatened with, irreparable injury as the result of the pending implementation of the said New York Social Services Law § 131-a, in the annexed complaint and affidavits of Louise Lowman, dated April 6, 1969; Sophia Abrom, dated April 6, 1969; Anne Lou Phillips, dated April 7, 1969; Marjorie Duffy, dated April 7, 1969; Eula Mae King, dated April 8, 1969; Cathryn Folk, dated April 6, 1969; Marjorie Miley, dated April 6, 1969; Julia Rosado, dated April 7, 1969; and Lydia Hernandez, dated April 7, 1969. It is also alleged in the annexed affidavit of Lee A. Albert, an attorney for plaintiffs, dated April 9, 1969, that immediate action is required prior to the anticipated adjournment of the Legislature of the State of New York on or before April 25, 1969, so that the increases in benefits mandated by the aforesaid Section [illegible] may be implemented by July 1, 1969, as required.

IT IS ORDERED that service of this Order on defendants at their New York City offices at 270 Broadway, New

York New York, or upon the Attorney General of the State of New York, at his office at 80 Centre Street, New York, on or before 12:00 Noon on the 10th day of April, 1969, be deemed sufficient.

IT IS FURTHER ORDERED that service of this Order be made by any of the attorneys for plaintiffs in this action.

J. B. Weinstein
United States District Judge

Dated: Brooklyn N.Y. April 9, 1969

D. NOTICE OF DEFENDANTS' MOTION TO CONVENE THREE JUDGE COURT (Document No. 6)

[Title Omitted in Printing]

SIRS:

PLEASE TAKE NOTICE that the defendants will bring on for hearing before the United States District Court in Room 10, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York on April 15, 1969 at 10:00 A.M. or as soon thereafter as counsel may be heard a motion for convening a statutory court of three Judges for the purpose of hearing and determining the issues raised by the complaint in this action:

Dated: New York, New York
April 11, 1969.

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants

E. Telegram from Judge Weinstein to Hon. Robert Finch, Secretary, Health, Education & Welfare (Document No. 8)

April 15, 1969
1:05 P.M

Honorable Robert Finch
Secretary, Health, Education & Welfare
Washington, D.C.

Preliminary hearing set for 2:00 P.M. Friday, April 18, 1969, at Courtroom 10, United States District Courthouse, 225 Cadman Plaza East, Brooklyn, New York, in case of National Welfare Rights Organization, et al., plaintiffs against George K. Wyman, et al., defendants, 69-CIV-355 challenging validity of New York State welfare laws under the Federal Constitutional Statutes and Regulations. This case may in-involve interpretation of federal statutes and regulations. You are requested to appear as a friend of the court if you wish to do so. Copies of this telegram sent to Attorney General of United States, Attorney General of the State of New York, United States Attorney for the Eastern District of New York and Lee Albert Esq., Attorney for plaintiffs.

Jack B. Weinstein
Judge, U.S. District Court
Eastern District of New York

F. Telegram from Judge Weinstein to Hon. John Mitchell, Attorney General (Document No. 9)

April 15, 1969

Honorable John Mitchell
Attorney General of the United States
Washington, D.C.

THE FOLLOWING TELEGRAM WAS SENT TO THE SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES:

Preliminary hearing set for 2:00 P.M. Friday, April 18, 1969, at Courtroom 10, United States District Courthouse, 225 Cadman Plaza East, Brooklyn, New York, in case of National Welfare Rights Organization, et al, plaintiffs against George K. Wyman, et al., defendants, 69-CIV-355 challenging validity of New York State welfare laws under the federal constitutional statutes and regulations. This case may involve interpretation of federal statutes and regulations. You are requested to appear as a friend of the court if you wish to do so. Copies were sent to the Attorney General of the State of New York, United States Attorney for the Eastern District of New York and Lee Albert, Esq., Attorney for plaintiffs.

Jack B. Weinstein
Judge, U.S. District Court
Eastern District of New York

G. Notice of Defendants' Motion To Join Additional Party (Document No. 23)

[Title Omitted in Printing]

SIR:

Please take notice that the defendants, George K. Wyman and the Department of Social Services of the State of New York, move this Court for an order that the Secretary of Health, Education and Welfare of the United States of America be summoned to appear in this action as a party defendant because in his absence complete relief cannot be accorded among those already parties, as will more fully appear from the affidavit attached to this motion.

The Secretary of Health, Education and Welfare can be made a party defendant without depriving this court of jurisdiction of the parties already before it. He is subject to the jurisdiction of this Court.

Dated: New York, New York
April 21, 1969

Yours, etc.,

/s/ Philip Weinberg

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants

H. Letter from U.S. Attorney to Judge Weinstein (Document No. 24)

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn N. Y. 11201

April 23, 1969

Honorable Jack B. Weinstein
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: National Welfare Rights Organization
v. George K. Wyman, et al.
Civil Action No. 69 C 355

Honorable Sir:

As indicated in our appearance before the Court this afternoon, the Government will be pleased to provide the Court with *amicus* memoranda upon any points of law which may arise in this proceeding and with respect to which the Court believes that the Government's views are required.

Very truly yours,

VINCENT T. McCARTHY
United States Attorney

By: /s/ Howard L. Stevens
Assistant U. S. Attorney

I. Revised Memorandum and Order of Judge Weinstein on Standing and Necessary Party (Original Document Nos. 17-18)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

April 23, 1969

Weinstein, D.J.

This is a class action brought by ten recipients of welfare payments under the Aid to Families With Dependent Children Program (AFDC) and two organizations whose stated purpose is to promote the interests of persons on relief – the National Welfare Rights Organization and Citywide Coordinating Committee of Welfare Organizations – to declare invalid and enjoin the implementation of the recently enacted amendment to New York's Social Services Law which allegedly cuts substantially the level of welfare payments throughout the state as of July 1, 1969. N. Y. Soc. Serv. § 131-a added by Laws Ch. 184, March 31, 1969.

Defendants have moved to dismiss as to the two organizational plaintiffs for lack of standing and to join the Department of Health, Education and Welfare (H.E.W.) as a party defendant. For the reasons stated below, defendants' standing motion is granted and their joinder motion is denied.

I. STANDING OF ORGANIZATIONS

The general rule is that parties may "rely only on constitutional rights which are personal to themselves. *Tileston v. Ullman*, 318 U.S. 44 (1943); Robertson and Kirkham, Jurisdiction of the Supreme Court (1951 ed.), § 298." *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). *See also Alderman v. United States*, – U.S. –, –, 89 S. Ct. 961, 966-67 (1969). Applied to organizations, this rule requires, in the absence of special circumstances, that there be an injury to the organization distinct from that to its membership. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479

(1965) (criminal conviction for aiding and abetting violation of statute); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (designation of organization as "subversive"); *cf. Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925). *But cf.* Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 653 (1962).

An exception to this rule has evolved out of a series of cases involving efforts by several states to curtail the activities of the N.A.A.C.P. *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293 (1961); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The N.A.A.C.P. was permitted to represent the rights of its members in each of these cases, all of which involved the freedom of association, because "[i]n each . . ., the organization itself was aggrieved by the violation of its members' rights and therefore plainly had the real adversary interest which is basic to the idea of standing." Note, Parties Plaintiff in Civil Rights Litigation, 68 Colum. L. Rev. 893, 919-20 (1968). *See N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) (statute to prohibit improper solicitation of legal business); *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293 (1961) (statute requiring certain types of organizations to file list of names and addresses of members); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (same); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (same; "the reasonable likelihood that the association itself through diminished financial support and membership may be effected"). Moreover, except in *N.A.A.C.P. v. Button*, to require the individual members to come forward and individually assert the right being claimed, "would result in nullification of the right at the very moment of its assertion." *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

In the instant case, there are no special circumstances warranting departure from the general rule requiring that

there be a distinct injury to the organization. *See United States v. Alderman*, – U.S. –, 89 S. Ct. 961 (1969). The freedom of association of the members is not involved and no direct injury to the National Welfare Rights Organization or Citywide Coordinating Committee of Welfare Organizations is threatened. Nor is there lack of effective representation, gross adversial inequality, or any practical or theoretical obstacle to the individual plaintiffs' effective assertion of their claims. *Cf. Smith v. Board of Education of Morristown School Dist. No. 32*, 365 F.2d 770, 776-777 (8th Cir. 1966); Note, Parties Plaintiff in Civil Rights Litigation, 68 Colum. L. Rev. 893, 920 (1968).

While the two organizations may represent a broader class than the individual plaintiffs – those who are not now entitled to receive welfare benefits but who would be if the standards of need were raised as opposed to those now on welfare whose payments will be cut under the amended statute – the relief presently being sought by the individual plaintiffs will inure to the benefit of all those who come within the broader class.

The liberal amended federal class action rules permit the Court to adequately protect those individuals who may be adversely affected by defendants' action even though they are not named as plaintiffs. *See* Federal Rules of Civil Procedure, Rule 23(c),(d). *But cf.* Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 656 (1962). In any event, the National Welfare Rights Organization and Citywide Coordinating Committee of Welfare Organizations will be able to assist the class by appearing as friends of the Court.

Defendants' motion to dismiss as to the National Welfare Rights Organization and Citywide Coordinating Committee of Welfare Organizations for lack of standing is granted. The Clerk of the Court is directed to strike their names from the caption of this case. Henceforth, this case should be referred to as *Rosado, et al. v. Wyman, et al.*, 69-Civ.-355.

II. JOINDER OF H.E.W.

Subdivision (a) of Rule 19 of the Federal Rules of Civil Procedure – the feasible joinder provision of the federal rules – is designed to protect the interests of absent parties as well as those already before the Court from multiple litigation or inconsistent obligations. It provides for the joinder of those persons who fall within either of two categories:

> A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impeded his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring doubt, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

H.E.W. does not fall within either of these categories. This Court would not "be obliged to grant partial or 'hollow' rather than complete relief to the parties before" it in the absence of the proposed new party. Advisory Committee Notes to Rule 19. Plaintiffs are seeking to invalidate section 131-a so that the present welfare law will remain in effect; they do not seek to cut-off federal funds. Such a remedy is an appropriate one and can be granted in the absence of H.E.W. *See, e.g., King v. Smith*, 392 U.S. 309 (1968); *Westberry v. Fisher*, 37 U.S.L. Week 2573 (D. Me. 1969); *Williams v. Danridge*, – F. Supp. – (D. Md. 1969); *cf.* Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 117 (1967). In none of the recent challenges to state welfare laws has H.E.W. been made a party. *See, e.g., Shapiro v. Thompson* – U.S. –, 37 U.S.L. Week 4333 (1969); *King v. Smith*, 392 U.S. 309 (1968); *Westberry v. Fisher*, 37 U.S.L. Week 2573 (D. Me. 1969); *Williams v. Danridge*, – F. Supp. – (D. Md. 1969).

To require plaintiffs to proceed against H.E.W. would place them in the untenable position of being forced to seek a cut-off of all welfare payments in order to challenge a law on the ground that it provides for inadequate payments. Such a rule would only serve to insulate state welfare laws from judicial review by deterring potential plaintiffs from challenging them in the courts.

Defendants do not suggest any possible prejudice to themselves from a failure to join H.E.W. They only contend that since participation in the AFDC program is purely voluntary, a state is not bound by federal standards in fashioning its welfare system and thus plaintiffs should be required to proceed against H.E.W. to force a cut-off of federal funds. This argument is without merit. Although a state has the option of withdrawing from AFDC, it cannot be said to have exercised that option by the passage of a statute inconsistent with federal law in the absence of an express statement of withdrawal by the state legislature. *See, e.g., King v. Smith*, 392 U.S. 309 (1968).

Nor will H.E.W. be harmed by non-joinder. While it does have an arguable interest in the subject matter of this litigation since it is required to review each state plan to determine whether the plan complies with federal standards and those standards may affect the fiscal contribution of the federal government, H.E.W.'s absence will not, "as a practical matter," impair its ability to protect that interest or expose any of the existing parties to double or inconsistent liability.

Strong support for the lack of prejudice to H.E.W. is suggested by the fact that this agency has opposed the motion to join it as a party. Its interests could be adequately protected, and its position could be made known to the Court, by the filing of an amicus brief. *See Lampton v. Bonin*, Civ. No. 68-2092, Sec. E. (E.D. La., complaint filed November 14, 1968) (H.E.W. requested to file amicus brief); *Jefferson v. Hackney*, CA-3012-B (N.D. Tex., complaint filed February 12, 1969) (same). Yet, not only has

it failed to seek the intervention to which it would be entitled (Federal Rules of Civil Procedure, Rule 24), it has refrained from submitting a brief or participating in argument despite repeated requests by the Court that it present its views.

Defendants' motion to join H.E.W. as a necessary and indispensable party is denied.

/s/ J. B. Weinstein
U.S.D.J.

J. TRANSCRIPT OF PROCEEDINGS OF APRIL 23, 1969 BEFORE JUDGE WEINSTEIN

(Testimony of Mitchell Ginsberg and Jack Goldberg)

(Document No. 61)

[At Page 72]

MR. ALBERT: Plaintiff wishes to call Mr. Mitchell Ginsberg at this time.

MITCHELL GINSBERG

having been called as a Witness, and being duly sworn by the Deputy Clerk, testified as follows:

THE CLERK: Would you state your full name?

THE WITNESS: Mitchell I. Ginsberg.

DIRECT EXAMINATION

BY MR. ALBERT:

Q. Mr. Ginsberg, would you kindly state for the Court your educational background in social welfare work and public assistance? A. I have an A.B. from the Tufts College in history, an M.A. degree in psychology, and education and an M.S. from the Columbia School of Social Work and I have done a variety of different forms of work in different places.

[73] I have been in the field for 32 years, on an up or down situation, depending upon which point of view, and I have been a professor at the School of Social Work at Columbia University and an associate dean for 14 years.

I have been Commissioner of Social Services in New York City for slightly under two years and for 15 months I have been the administrator of the Human Resources Administration.

I am a consultant to HEW and OEO, and a variety of other organizations of that type.

Q. Most of this extensive work has been done in the State of New York? A. I've been in New York continually from 1948.

Q. You are quite familiar with the Public Assistance Program—excuse me, the Public Assistance Administration in New York City, particularly the ADC program. A. Yes, I am.

Q. Could you describe the components of a grant under the present system in the ADC program? A. The basic grant which is given twice a month, bi-weekly, is designed to cover what are considered the ordinary recurring expenses, such as food, clothing and [74] incidental and personal expenses, rent, heat, so forth.

At the present time, New York City has a grant and a feature, which is a cyclical grant, $100 per member of a family per year, which is designed to meet what formerly was considered certain special expenses, such as clothing and furniture, large items of that sort, because of the feeling that the basic grant as such did not provide adequately for those particular benefits.

So we have this cyclical grant in addition and plus that, there are a number of special grants, such as moving, special diets, certain transportation expenses and items of that nature which are not covered, either, under the basic cyclical grant and based on the specific needs of the individual or family representing the claim.

Q. Are all of the components of the special grants expressed in terms of amounts of money? A. Yes.

Q. How in turn, are these amounts determined? A. Well, the basic element in this is of course, the size of the family of the individual involved.

If it is a one-person family—under the present system, the age of the children make a difference in the size of the grant. Within a family of four, the size of the grant differs as to the age of the oldest child [75] in the family.

Q. What is the reason for that? A. The assumption by the State and most of us who have had any experience in this business, the older child, the oldest child is more likely to have expenses which are greater and due to the fact they are in school and school in itself presents certain needs which are more true for school-age children, teen-agers, obviously and therefore, the State has recognized the fact that grants for families should be somewhat higher with older children than those of younger children.

Q. The amounts purport to reflect the cost of these items? A. Yes. On a standard of need.

Q. How do these amounts compare with existing budgettary studies with, say New York City, or New York State? A. Welfare budgets as such, tend to be lower than what most other organizations generally feel is needed.

There have been studies by the Bureau of Labor Statistics, a series of three different levels that they have come up with. Community Council makes a study.

There is a Community Service Society which has a study and it recommends what it thinks is the [76] appropriate minimum and those are substantially higher.

You do have to remember that the welfare family or individual does receive such things as medical care and does not pay taxes, thus, some adjustment had to be made between the estimates arrived at by these other groups and the actual size of the welfare grant.

Q. Allowing for these adjustments, is it a fact that the welfare grant is significantly less than a projection for low-income family? A. Yes. I know of no study after you have taken into account what I have said, which does not set a level substantially higher than the existing welfare grants.

Q. To what extent do present grants provide for a nutritutional, adequate diet for a family of four? A. I don't claim to be an expert in nutrition and I think there is a difficult problem here in giving any statistical basis on these very few actual studies on this subject that have been done.

There is no question, certainly based on experience of those of us who are in the business, that the diets of people on welfare are, if adequate, are minimally adequate.

There is no question that in terms of people with special needs, pregnancy, diabetes, the problems [77] are aggravated and there is also statistical evidence, for instance, in New York City, and one cannot attribute this to welfare and obviously, many of the people that are on welfare, that the infant mortality rate in New York City is two to three times higher in certain areas which have concentra-

tions of poor people and welfare clients than other areas in the same city, where you don't have the same composition of the population.

[78] Q. Is it a fact that there is not much margin for flexibility in using one's food money? A. Yes.

I have long felt that one of the most disturbing and difficult aspects of this is that there is no flexibility.

The welfare budget is designed in a sense to be that way, and most of us, if we were in a situation where we have a special need and we want to do something one month or one week against another, we can do it with some reasonable assurance that we can make it up within one month or two months.

That is literally impossible under the welfare system and this complete lack of flexibility which goes so far as not to permit savings accounts, and so forth.

This is one of the present features of the welfare system.

Q. Are you familiar with the legislative measures passed by the New York Legislature on March 31, 1961, particularly Section 131 A and related provisions? A. Yes, I am.

Q. Can you describe its impact on the age of dependent children caseloads generally in New York [79] City, financially? A. I would say it has two major aspects, from my point of view, for a substantial majority of those clients, it lowers the level of benefits that they are getting now when you take into account the cyclical grants which will put in for specific purposes, of actual need.

So in that sense, in terms of base of what would be the new basis grant on July 1st, the majority of people under the ADC program, would get less money than they receive under the existing program.

In addition, it takes away a variety of special needs and some of the most disturbing facts are the special diets and it eliminates the moving expenses, expenses in the home such as fumigating the apartment, transportation for illness when necessary, or to visit a relative outside the City. There are a series of those which will be eliminated. Therefore if a client is forced to any one of these things, it would be

necessary to take it out of the reduced allowance and that seems to be the difficulty and undesireability of the recent legislation.

Q. Putting aside any assessment of reduction from the abolition of special grants, except for the [80] cyclical, which we will consider as a part of the regular grant for this question, can you describe its financial impact in terms of reduction on say, a family of six with an older child? A. Yes, if I glance at my notes, our estimation is 80% of the current cases, covering 75% of the individuals, will receive less money than they are receiving under the existing program.

As I said, you do have to take a look into a family of six or any size family, at the age of the children involved.

If the oldest child is 20 to 21 and there would be very few of those, the reduction in the grant would be $780 a year. Where the oldest child is 14 or 15, and it goes on the basis of the oldest child, the reduction would be $444, intervening at $660, $540, $180 and so forth. It is not until you get down to a situation where the child is—where the oldest child is 10 or 11 and that becomes somewhat difficult when you have more children in the family and then, you get an increase of $84, so, it's clear, using a six person family, the overwhelming number of them would get less money.

Q. And the impact of larger families than six would be more—

[81] MR. WEINBERG: We object to this testimony. This is supposed to be under the temporary restraining order, which your Honor knows under rule 65 can be for ten days.

Everybody knows this statute cannot taken effect until July 1. I do not want to make objections. It is ludicrous for me to permit this testimony to come in on the question of a temporary restraining order, which I assume is the question we are here to discuss.

The statute is not taking effect for more than two months.

THE COURT: I have some doubt about maybe you are right that a temporary restraining order can only last for ten days, if it is on notice, and there is a hearing.

MR. WEINBERG: It certainly cannot last any longer than your Honor convenes a three-judge Court or decides not to and decides to go ahead with the preliminary injunction.

That is going to be well before July 1st. I do not see what the cuts affected by [82] the statutes which is not going to go into effect for another two months has to do with this testimony.

THE COURT: Well, one thing. I believe that if there is a three-judge Court, the temporary restraining order may last until the decision by the three-judge Court.

MR. ALBERT: That is correct, your Honor.

THE COURT: Now you know as well as I that some of the decisions of three-judge Courts in this District have come a year or more after the case was argued.

MR. WEINBERG: Of course, that is true, but these Plaintiffs can make an application at the time the three-judge Court is convened, which will certainly be before July 1st.

THE COURT: In addition to that, there is the question which is basic to this hearing, and that is whether the administrative changes which take place in the interim will be irreversible and the problem then is one: What adverse effects may take place after July 1st, because the administrative changes which are made on the [83] assumption that the statute is valid can be changed.

In any event, your objection is overruled. I will hear the testimony.

BY MR. ALBERT:

Q. Was it your testimony, Mr. Ginsberg, that in addition to the reductions that you just talked about, monetary reductions, there is an abolition of special grants that are now available to deal with items of special need? A. Yes, that is right.

Q. With regard to those items, each would be expected to use whatever they will get under the new system for those needs? A. There will be no alternative.

If they're forced to move, it costs money to move and they will have to take it out of the only resources they have.

Q. Are these items of special needs now available in widespread use in the City of New York, as for example, moving expenses? A. Yes, they are.

I believe Commissioner Goldberg can give more information of the exact figures, but as I recall, the total cost for that particular item in the past fiscal [84] year, has been five million dollars.

So—

Q. That is in the City of New York? A. That is right. That's just the City of New York. Therefore, clearly, that is an item of substantial—poor people are forced to move quite often and the kind of housing and the extent of housing available to them is extremely limited.

Q. The grant for rent is unchanged under the new amendment? A. Yes. That remains as it is.

Q. Does that grant properly calculated leave anything over for food, travel, and the like? A. No, the grant is based on exactly what the rent is charged per person. So, any change in the rent allowance simply means that additional amounts of money goes to the landlord and has nothing to do with what the client has left over.

Q. It is also subject to certain limitations imposed by the Department? A. Yes, that is right, but in any case, it is limited to the exact rent the client is forced to pay.

Q. Assuming these reductions were fully implemented on July 1, what kind of events or harms, in [85] your experience will recipients face or bear when tney are implemented? A. Well, I think that goes back to what I have said about the lack of flexibility. The only item about which conceivably you can argue there is in flexibility is the food item. To a limited extent, I suppose that is true of clothing. That is such a small proportion, it is not meaningful.

Therefore, the only thing that a client will be able to do is to reduce the amount of money spent on food, considering the fact that that is a minimal amount and considering

the fact that the cost of living is increasing, going up as it has been recently, and there is no indication of a change in the next few months.

You are going to inevitably be faced by a choice by a client of having less food for himself or herself and the family, or doing without some of these items. Some of which they cannot do without.

So I think the inevitable result will be less food and therefore, it's very clear to me in cases of some of these people that there are bound to be medical effects.

Q. Is there a grant now available for travel to health care facilities, either for ordinary [86] cases, or for crisis care? A. Yes.

Q. That would be abolished by the new law? A. Yes, except for prior flood and special emergencies, which I have heard defined as an earthquake.

Q. Is there a grant available now for special diets for people of proven illnesses and needs? A. Yes, there are, including pregnant women.

Q. That will be done away with? A. Yes.

Q. Is there a grant now incidental to child birth and infancy? A. Yes.

Q. Will that be done away with? A. Yes.

Q. The present grant for furniture and clothing will be done away with also? A. That is included in the cyclical grant and as we understand the cyclical grant, it is being eliminated.

Q. Is it a fact in your experience, that under the present grant levels, the subject of money is a source of unremitting concern to ADC families, particularly at the end of the month? A. Absolutely.

[87] As you get closer to the end of the grant, the pressure gets greater. There have been a number of studies of that nature done and a number of reports of that kind, and anybody who has direct contact with welfare clients knows that is the number one cause of concern all the time. But particularly towards the end or latter part of the grant period.

Q. Looking to the present situation today, without the implication of the cutbacks, but the widely publicized threat of them, what kind of events or harms are people likely to be experiencing now from the fact that this statute will be going into effect? A. One of the characteristics of living on welfare is almost the perpetual state of anxiety and tension, because one literally is under pressure day by day, even under the existing system, and the concern as to what will happen next inevitably is going to increase that kind of pressure.

Those of us who have had experience with poor families, families on welfare, know in addition to the financial problems and the problems of potential illness and lack of adequate nutrition, there is the problem of tension on family life and strains on family life which are present all the time, but which in a situation of [88] additional anxiety, because of this concern, there is bound to be increased anxieties and tension and then, there is the problem of children in school, which I think tend to get overlooked.

Children are particularly likely to want to be able to do what other youngsters can do and not be stigmatized or marked out as being different.

Unfortunately, to a substantial extent, welfare does this, anyway. I see this problem being aggravated and I must say I suppose it's not evidence, but at the time when a country as rich as this, why we shouldn't be doing more for children, this is rather deeply disturbing to me and my colleagues.

Q. What kind of effect does the new legislation have on the moving plans of people for next month? A. If I were—suppose if I were in a situation, and wanted to move before the time comes which would mean I might be faced with a less adequate choice, then I would have later on and would be forced into more undesirable quarters.

In the State of New York, being on welfare is one factor where you can be discriminated against, simply because you are on welfare.

Q. Discrimination is a factor in welfare [89] recipients' lives? A. Yes. There are very documented cases of land-

lords refusing to accept clients simply because they are on welfare.

Q. Do you foresee any effect on this problem of landlord discrimination by reducing the budget on the welfare recipients? A. I assume it is a speculative one, but it has crossed my mind that landlords, knowing this can happen and knowing also there is always a temptation that welfare clients, when pressured by other factors might use up the grants for other situations and presumably, the landlords might decide they are even less desirable as a tenant.

[90] MR. WEINBERG: I move to strike this question and the previous ones.

I recognize a great deal of leeway is necessary in testimony of this nature. I recognize a temporary restraining order is a discretionary matter and there is no Jury here, and all that.

At the same time we have heard the most speculative imaginable answers, and we have heard conclusions of law. There has to be some outer limit, even in this sort of an application.

THE COURT: They are the opinions of a leading expert and they are acceptable, but I think you ought to drop this line and move to your next line.

You have sufficiently explored it for this purpose.

BY MR. ALBERT:

Q. What is the size of the present ADC caseload in New York City, approximately? A. Approximately 750,000 including mothers and children.

Q. What percentage does that represent of the [91] State in ADC? A. I would guess close to 90% and perhaps 85. New York represents, as I recall, 70 to 75% of the total caseloads and has a great concentration of ADC.

Q. Do existing day care centers allow mothers to work and have children cared for at the centers? A. There is a desperate shortage of day care facilities for children of ADC families. For children of poor families, generally.

So I believe we have the equivalent of 12 or 14,000 youngsters in those day care facilities.

I would estimate at the moment that perhaps 25% of that number are actually the children of ADC families.

Q. Do you foresee any significant changes in the availability of day care centers in the next year? A. Yes. We would hope to expand them.

Q. Do you foresee any significant expansion? A. Well, I would say it depends one: On primarily the amount of money available for that purpose. We've been urging that more use be made of the Federal funds and secondly: there is a facility problem of finding appropriate space for those programs.

MR. ALBERT: May I consult for a moment, your Honor?

[92] THE COURT: Yes.

MR. ALBERT: I have no further questions, your Honor.

Will your Honor indulge a very quick question to the Witness?

THE COURT: Yes.

BY MR. ALBERT:

Q. Mr. Ginsberg, did you testify, under subpoena today? A. Yes.

MR. ALBERT: Thank you.

CROSS EXAMINATION

BY MR. WEINBERG:

Q. We have heard a lot of testimony from you about the welfare system.

When you are referring to the welfare system in your testimony you mean the welfare system as it is nationwide, administered under the social security law, do you not? A. Yes, both nationwide, and in New York City and State, of which we are obviously a part of that, but I am talking of both the national system across the country as well as it is carried out in the community.

Q. Does the level of benefits in New York [93] State as well as New York City compare favorably or unfavorably? A. They are higher than most states and cities in the United States.

Q. With regard to the changes that are going to take effect when section 131 A takes effect, do you know when that statute is going to take effect? A. As I read the legislation and I must admit, it is somewhat confusing, it is scheduled to take effect on July 1st.

Q. 1969? A. Yes, sir.

Q. Now, the damage that you testified to that is going to result according to your testimony when the statute takes effect, that is by definition going to happen when the statute takes effect or after? A. I tried to make distinctions of two things: One is that some of the concerns I've had about what is happening now in anticipation of those effects, and secondly, some of the specific effects that would be obviously taking place after the cuts have gone into effect.

Q. But, Commissioner, the thrust of your testimony seemed to be towards what was going to happen when the schedule grants were eliminated for moving, for [94] telephone, for diets, and the like. A. Pardon?

Q. For diets. A. Oh, I would agree that the more serious effects will be after the cuts have actually gone into operation.

Q. Let us analogize this a little further.

Specifically, what damage, if any, is going to happen before July 1st, 1969? A. I believe where I testified about in terms of the concerns that people have; knowing that what is basically a limited amount of money available to them under the best circumstances, even though it is perfectly true we are higher than most of the rest of the country, knowing there is going to have to be less than that, this puts a great deal of pressure on a family as it would be on any of us, whether on welfare or not, that if we knew as of a certain date we would be going to have what I consider substantially less money than we have available to us now.

It affects our planning with respect to such specifics as perhaps moving.

Q. Isn't it a fact that many welfare recipients, although perhaps not a majority, will get more money under the new

statute? [95] A. Our studies show that the total welfare cases,—75% of the people will get less money and where there are cuts, they tend to be on an average substantially higher than the increases that the majority would get under the average.

Q. Commissioner, you testified as to special grants that are afforded by New York City.

Is it your testimony that you prefer the system of special grants to a system of a flat grant? A. The special needs or cyclical grants?

Q. Special grants for special needs, first, such as moving, telephone, alike. A. I believe under the present size of the cyclical grants, or the so-called "flat grants," as it is more popularly known, there are needs for grants to meet needs for moving. It's conceivable in the future we will move to a different kind of a system which will provide one specific grant which will take care of these things. But it obviously will have to be substantially higher than the existing one.

Q. Isn't it a fact under your leadership New York City moved away from special grants? That it established a project with a flat grant? A. We established what I believe was a simplified [96] payment program, which provided a cyclical grant to take care of—I think I indicated to certain special needs, such as clothing and substantial large furniture, but it was not intended to take care of some of these special needs which would now be eliminated as a result of the State legislative act.

Q. Isn't New York City voluntarily heading in the direction of moving away from special grants? A. There is no doubt.

As I have said we look forward to the day we will have a real flat grant system that would eliminate some of these special needs, as well, but that would be dependent on the fact that it was substantially higher than what we have at present.

Q. Isn't section 131 A without regard to a dispute about the amount of the grant, isn't it a step in that direction, to that extent? A. Mr. Weinberg, I submit there cannot be

any meaningful discussion of welfare without the discussion of the level of the grant.

The single most important of the welfare system is the level of the grant and the money available to poor people and it's impossible to discuss it without taking that into consideration.

[97] Q. Isn't it a fact that nonetheless 131 A is a stride in the direction of the one big flat grant which is moving in a parallel direction with the voluntary direction that New York City has been moving during your leadership? A. In the leadership of Commissioner Goldberg and myself, in that direction at a higher level and I must find difficulty with saying how that coincides with us in going in the opposite direction with respect to level.

If the Legislature had increased–

Q. I didn't ask you about the level. I asked about the flat grant versus special grants. A. I'm in favor of the concept of a flat grant. I am in favor of a higher level of payment for people on welfare.

Q. Isn't it a fact that under the present 1969 State budget, New York City is going to receive more money from the State than it did last year? A. Are you referring solely to welfare?

Q. Yes. A. Yes, I would assume that. That's because it is anticipated, and there is no question about it that we'll have more people on welfare.

[98] Therefore, the total will be larger, but the amount per person would be less.

Q. Are the costs for the average family on aid for dependent children higher in New York City than they are in other parts of the State? A. Well, from what I have looked into and I don't claim to be an expert, I don't think they are sig-significantly higher, let us say in metropolitan New York, but if you are asking me a comparison between New York and St. Lawrence County I would say they are higher in New York with respect particularly to rent, food and other items.

Q. What about New York and the adjacent counties outside the city? A. I have a friend in the Bureau of Labor

Statistics, and he tells me there is no variation between New York, Nassau County and Westchester County, for example.

Q. You testified about day care centers, Commissioner. Are they paid for by the City of New York? A. Under the present system they are 50% city and 50% state.

There is Federal money available under certain conditions which would provide 75% Federal and 12½% [99] City and State and that is the direction we are hoping to get the money from.

Q. Has the State done anything to discourage the establishment of day care centers by your department? A. By hesitancy as I do not want to get into motives. I believe the State and we are equally convinced of the need of day care centers.

I think we have been disturbed by what appears to be a lengthy interval of taking advantage of the Federal program.

Q. Commissioner, you testified regarding expenditures, regarding things like moving and the like.

Isn't it a fact that even under the statute that is slated to go into effect July 1st, 1966, that those things could be still paid for possibly under a purchase of services basis or something of that nature? A. I understand that is a possibility. We have not been officially informed of that so that I can only go on what we know as of this moment.

Q. So you certainly can't conclusively state that they wouldn't be, and you can't conclusively state that those things will be stricken from the budget of a welfare client? A. To the best of our knowledge, those indicated [100] are to be stricken out. The only one which I understand there is some question about, is the one of moving. That is the only one that would apply to it, and I know of nothing officially that would be different than what it is in the legislation.

Q. The ones you enumerated in your testimony on direct examination is the largest, moving? A. It is the largest in amounts of money, which is significant to the client. That is a difficult one. I suppose if I had to make some

kind of a rating, I might put very high the special diets for pregnant women.

I happen to think the mothers and kids about to be born ought to have a special priority and this legislation goes in exactly the opposite direction.

Q. Without minimizing the importance of the diet of a pregnant woman; isn't it correct that the amount necessary for a special diet is infinitesmal with regard to expenses for moving? A. Yes, that's why I fail to comprehend why the State has taken that action.

Q. Just one or two more questions.

The impact of this statute according to your testimony, the statute goes into effect and the changes are going to go into effect July 1st? [101] A. That's right.

Q. You testified on direct examination that there may be a certain amount of anxiety on the part of welfare clients knowing that perhaps an emphasis perhaps on the payments are going to be cut.

Not all payments are going to be cut. Some will and some won't. How would a temporary restraining order by this Court prior to July 1st alter that picture?

MR. ALBERT: Your Honor, that is a rather inappropriate question.

THE WITNESS: I wouldn't know that.

THE COURT: Yes. Sustained.

MR. WEINBERG: We have no further questions.

THE COURT: Any redirect?

MR. ALBERT: No further questions, your Honor.

THE COURT: Thank you very much.

(The Witness leaves the Stand.)

THE COURT: Next Witness please.

MR. ALBERT: Commissioner Jack Goldberg to be called to the Stand with the Court's permission.

[102] JACK GOLDBERG

having been called as a Witness, and having been duly sworn by the Deputy Clerk of the Court, took the Stand and testified as follows:

THE CLERK: Will you state your full name for the record?

THE WITNESS: Jack R. Goldberg.

DIRECT EXAMINATION

BY MR. ALBERT:

Q. Mr. Goldberg, would you state your educational background in the area of public assistance administration and social welfare? A. Bachelor's degree, Brooklyn College. Master's degree and Doctorate, N.Y.U., Camping and Education.

Q. Would you state your experience in the field of public assistance? A. Education Alliance, lower east Side. Williamette Camps, Inc., Office of Economic Opportunity, Juvenile Delinquency Program, Consultant, New York City Housing Authority, Social and Community Affairs.

Part time faculty member, Columbia University, New York University, Sarah Lawrence.

[102a] Q. Can you state your present occupation? A. Commissioner, Department of Social Services, since February 1, 1968.

[103] Q. As a result of that position, are you familiar with the A.D.C. program in New York City? A. Yes, I am.

Q. Can you explain the reasons for special grants that we have heard about today existing under that circumstance for a variety of items, that is, why are there other established categories and in what circumstances are those grants made to people? A. The history of the special grants program was predicated on the assumption that there were at times special needs that individuals and families had and under a historical administration, an individual judgment was made on the basis of an individual need and an individual client as to whether or not they had need for such a grant.

Q. Was that assumption based upon the fact that the regular recurring grant was not adequate to provide for these items? A. The assumption was there was need in addition to the recurring grant to have this kind of ventilation or special kind of consideration.

Q. When are grants for special diets now awarded? And to whom and under what circumstances? A. They are awarded on the basis of a medical opinion, [104] on medical findings, that somebody is in fact a diabetic, for example, and therefore requires special kind of consideration in diet.

Special grants are provided for pregnant women who are—there is concern about the need for them to have an enriched diet while they are, in fact, pregnant.

Q. How about the item of telephones?

Is there a grant made for them? A. Telephones are predicated on three factors. One is the aged and infirm. The other is health considerations and social isolation and each of those is defined individually and consideration is made on the basis of that.

Q. Are there grants specifically available for employment? A. Yes.

Q. That is not covered by the immediate aid program? A. No, that is not included. Transportation is available for travel to plants, travel to hospitals, travel to a family planning clinic. Those are part of the special grants that are currently available.

Q. Is there a special grant for a visit to an institutionalized relative or to attend funerals? [105] A. Yes, if a parent happens to have a youngster institutionalized out of New York, or in New York, there are special transportation grants that are available.

Q. And, the grant for moving expenses is to cover what items are involved with moving? A. The moving expense grant provides paying the mover to move the furniture and personal effects from one apartment to another.

Q. Are these grants available today for security deposits for a new apartment, brokerage fees, finding a new apartment, fumigation services? A. Yes, there are.

We provide what is a standard one-month security deposit when somebody is procuring a new apartment.

We provide when the need is indicated a fumigation grant.

These are all special grants that are currently in effect.

Q. In addition to that, does the regular recurring grant cover ordinary items? A. Yes.

Q. Does that purport to be based on the cost of such items? A. Well, it is based on the definition of need as [106] defined by the State Department of Social Services and the State Board of Welfare.

Q. Has New York always paid 100 percent of ~~what~~ it defines the need to be? A. Yes, it has.

Q. In your opinion, are the amounts assigned to those items of need now covered by the regular grants as well as special grants available? A. It has been my own professional view and studies done by others that we have not met the standard minimum that people need in this city to maintain themselves.

Q. What is the one budgetary item now—well, now available in your experience which would be used, or which is used to cover items that aren't budgeted for? A. In my own judgment, a welfare client or family in terms of management of their resources, the only place they can have any kind of flexibility is on a food budget, which is in itself a significantly limited budget.

Q. That would be a budget that would be used for other purposes? A. They might well do that, yes.

Now, in addition, we had experienced where families have used rent money for other purposes and then, have had difficulty paying their rent.

[107] Q. What is the effect of using rent money for other purposes? A. It creates a situation where either the Department provides duplicating funds for them, or they are faced with an eviction eventually.

Q. Are you familiar with the legislative amendment of March 31, 1969, particularly Section 131-A relating to provisions dealing with schedules of grant levels? A. Yes, I am.

Q. Which are the special grants that we discussed before do not survive from your understanding under the new law? A. Well, based on the legislation, literally all special grants

are removed. There has been some tentative indication of some administrative adjustment, for example, moving, but to the best of my knowledge, there has been no change with regard to things like security deposits or brokerage fees or, for example, a layette for a woman about to give birth or for the special diets or for telephones.

There are several others, but those I think are the more critical ones.

Q. Do the new grants purport to meet the need [108] in full of recipients, the items that are included? A. As I read the legislation, it indicates that the maximum schedule —the assumption is that it suggests that it meets the needs as indicated, or as defined.

Q. Can these figures conceivably meet needs based on costs of living? A. In my judgment, they cannot, because under our current system of grants, I would have the contention that we do not in fact meet needs now and if the effect of the new grant is to in fact lower the substantial level of welfare clients in the city, then, clearly in my judgment, it does not come anywhere near meeting the needs of the people.

Q. What items now are being met which will not be met after July 1? A. Well, clearly—

Q. Are there any luxuries which can be easily foregone by recipients? A. With the elimination of all of the special grants with a decrease for most of the families of their basic recurring budget, I wouldn't suggest that there ever was any luxuries into the budget previously and clearly, the little flexibility that might have been there, in my judgment is considerably restrained and reduced.

[109] Q. Is there any connection in your experience between an inadequate income allowance for, say, food and clothing, and educational performance? A. Yes, I think there has been a reasonable amount of documentation indicating the relationship of low income, profit income to school performance to educational performance.

Q. Is there any connection between the same inadequate income for food and clothing and family life? A. Yes, I

think here again we have a sufficient study in the field that would indicate the one of the casualities, one of the relationships to family stability is the degree of trust that arises out of the income level of a family.

Q. Is there an incentive in the new law for students–family units, rather than larger family units?

Would it, in other words, be financially profitable for a family of eight to be divided into two families of four, or send the children to smaller units? A. If that were conceivable, yes, because there is the new payment system. A new standard of public assistance. The small families with younger children do [110] in fact realize some additional dollars. The larger families, the older children, the more significant the loss is to the family.

Q. Is there a grant presently existing relating to family planning? A. A special grant, no. We would provide transportation for somebody to go to a family planning clinic, but there was no particular special grant.

Q. Would that transportation be similarly provided under the new law? A. To the best of my understanding, no, it would not be.

Q. Or for medical care or health care? A. No. Transportation as we read the legislation and even with the indications that we have would not be included for that purpose.

Q. How adequate is housing presently occupied by A.D.C. recipients in New York City? A. I think on the basis of our own knowledge, the studies that are now available, the housing supply available to welfare clients is at best terribly inadequate.

Q. Is the problem of landlord discrimination one that you have experienced against welfare recipients? A. Yes, we hear literally every day from the field [111] and from our housing staff of repeated experiences where welfare clients are turned down purely on the basis of the fact that they are in fact welfare clients.

Q. Is there any study of the fact why landlords discriminate or turn down welfare clients?

MR. WEINBERG: Objected to.

How far afield can we go here?

THE COURT: Sustained.

Move on.

Q. Describe the present grant for clothing and items of furniture in New York. A. We have currently what we call "a cyclical payment" which provides for the payment of $25 a quarter per person.

So, that a family of four would get, in four different payments, the sum of $400.

Q. When was that system instituted? A. August 27, 1968.

Q. When is the next check per person, $25, due under that system? A. That would be scheduled, I believe, somewheres during the first week in July.

Q. Assuming the new legislation is implemented, will it be issued? [112] A. No.

Q. Was there a policy in your department to encourage people to purchase on the installment program on reliance of those checks? A. There was no formal policy the department took. Workers in the field encouraged families to use that method in order to purchase large items.

Q. Is it your experience that welfare clients in New York City do have a small, but some amount of credit to purchase on installments? A. Yes, many of the families involved do in fact get involved in time purchasing or credit buying.

Q. Would that also be true, say, for example, for the neighborhood grocery store and places like that? A. Yes, that is so.

Q. What would be the effect on people who have purchased items of clothing or furniture in reliance on the cyclical check, for example, the one in July and the one subseto that who are not going to receive it? A. I would think the impact would be one, to turn off any plans they were making anticipating what they would need and what they would have to do and pass that. It may very well affect plans they are already committed to and contractual rela-

tionships they're already committed [113] to, anticipating the cyclical grant would be paid.

Q. Is it a fact that budgeting the monthly grant, the semi-monthly grant is a problem of varying experience in the lives of recipients? A. Yes, I wouldn't have any question about the extreme pressure that a welfare family lives under with the amount of money that they receive to put the nickels and dimes where they have to be on a day by day basis.

Q. Are the widely publicized cuts liable to affect the budgeting and calculations of people today? A. I would conjecture that there will be anxiety. There is at this point and that this may very well have an affect on what people do with money now, and certainly with regard to the cyclical payment. There is a clear impact on what they are planning for the future.

Q. Commissioner Goldberg, how many agency recipients are there today in New York City? A. Just about a million. A.D.C. recipients?

Q. Yes. A. We have approximately 600,000 children and approximately 180,000 mothers.

Q. What percentage of the total case load in the State does that represent? [114] A. It is an overwhelming 80 percentish.

Q. Approximately how many case workers are there in New York City? A. Case workers alone, we have some 12,000 persons as case workers.

Q. Approximately how many supervisory personnel and case units? A. We have approximately another 5,000 supervisors and an average of 26 case units in each of the 42 centers.

Q. Is it fair to state that all these persons must be familiar with they new system contained in the legislative amendment by July 1? A. Yes, they would have to be familiar with the system they have now and that isn't always achieved very easily.

Q. How many checks on a bi-monthly basis are issued to A.D.C. families in New York City? A. We issue to the

family units, 180,000. 180,000 A.D.C. checks every two weeks.

Q. What actually has to be done in your department to fully implement the legislation under question here by July 1? A. Well, each of the A.D.C. cases and in fact the total case load which is some 380,000 cases, each of those [114a] have to be re-budgeted on an individual basis and based on the material that we have in front of us now, based on the new level of assistance and based on removing the special grants that may now be part of the checks that are being rendered.

[115] BY MR. ALBERT:

Q. Can you in fact do this fully for the entire case load by July 1st, assuming the situation is as you now see it? A. If we can begin on the 1st of May and have all the questions answered that have to be answered, we would in fact be able to implement under pressure the necessary changes by the 1st of July, but we clearly have to have the lead time.

It is indicated by me saying if we go by the 1st of May.

Q. What in your view would be the effect if you were told, assuming now you began the 1st of May taking all necessary speed to implement this by July 1st, what would be the effect of being told, say in June, the previous law, in all aspects, was going to be continued? A. Well, I think we would have at that point created one round of sheer havoc. We couldn't possibly turn around at that point. I think what we would end up doing, hopefully, is getting the public assistance checks out based on the current system that you are suggesting would be changed if in fact we could do that.

Q. Would it make a significant difference to [116] you administratively to know now that either the new legislation or the old one may be the one in force on July 1st? A. Yes, it is critical.

Q. As opposed to not knowing anything, I mean. A. It is critical for us to know where we are at literally by the 1st of May for us to do the things that we have an obligation to do under the law.

Q. Processing the special grants today requires a case worker to do what? A. To meet and talk with the client, depending upon what the nature of the grant is. To have the necessary kind of authentication, for example, on a special diet, there has to be some medical input. To secure necessary approval from the next level supervisor to write in a proper authorization for that special grant and for it to be added to the recurring check that is received bi-monthly.

Q. Is it accurate to say this process from beginning to the issuance of the grant can take several weeks or months? A. It can. It does not necessarily take that length of time all the time.

[117] In some instances, it may and in some instances it may be turned out much more quickly than that.

Q. Will there come a time before July 1st, based on the new legislation, when case workers will cease to process special grants which would have to end on July 1st? A. Well, that's going to present an interesting administrative problem. Particularly, under the law, a client is in fact entitled to special grants up to June 30, 1969, assuming that the new legislation goes into effect July 1st.

Up until I guess 12:00 midnight, every client is really entitled to receive special grants if they are qualified for it.

When we stop processing those and go through the process of approving and agreeing and instituing the changes in the checks and at what point we cut it off, because we know there is going to be another administrative horror.

Q. Realize particularly would anyone process a telephone grant, for example, in June under the new law going into effect on July 1st? A. It would make no sense. Legally, that client would be entitled to have that processing.

[118] Q. If someone were planning to move, for example, in July, what would be the case worker's response, who is not a lawyer, to the client? A. I would only conjecture, because you know, the reactions of case workers vary from case worker to case worker.

For some, I would think that they have questions and whether or not they ought to sign off on a moving expense in view of the fact that tomorrow or the next week it is not going to be, I think clearly I would have to acknowledge that the fact that the law would be effective on the 1st of July will have some effect on our practice, our attitudes and our administrative procedures.

I cannot distinctly define how, but if the question is will it affect it, I think yes, it will.

I cannot qualify or specify as to how, but it is clear that it will.

MR. ALBERT: May I have just one moment, your Honor?

THE COURT: Yes.

BY MR. ALBERT:

Q. Commissioner Goldberg, are you testifying [119] here today under subpoena? A. Yes, I am.

MR. ALBERT: I have no further questions.

THE COURT: I have a question, Commissioner.

You understand that what the Plaintiffs are asking is to prevent you from taking steps which you have taken now to prepare for the July 1st change, which would prevent you from going back to the present system.

In effect, as I understand it, they are asking me to order you to continue in a posture preparing for either the new system or the present system after July 1st, so that you can use either system, depending on whether the law is declared Constitutional or not.

Are you equipped to go both ways?

THE WITNESS: No.

As I tried to indicate, the process of rebudgeting is a very complex one.

During my tenure, we have been through two such rebudgeting procedures relating to the increase in the cost of living. Each of those is a tedious job that requires workers to be [120] corrected, trained, instructed, forms to be complete systems in our machine set up, our EDP system to be changed, programs to be changed, It is a complicated manpower and technical job and it would be a very serious prob-

lem in our being able to go both ways at the same time, as I gather your Honor is suggesting.

THE COURT: I take it that is the position, at least part of the position in this order.

You say that unless you know by May 1st you cannot administratively handle a change-over by July 1st.

You know, this is the 23rd of April. That just gives us seven days.

THE WITNESS: I would say to you May 6th is a possibility, too. I am trying to underline that we literally need the information within the first week of May.

THE COURT: Even though the new system is a lot simpler mechanically, I take it?

THE WITNESS: It is a simpler method in its end result, but not simpler in implementing it to get the end result.

THE COURT: Why is that?

[121] THE WITNESS: Each income level is going to have to be determined from the point of view of whether a client is still eligible or not.

THE COURT: I see.

THE WITNESS: In addition to that, each budget has to be reviewed to see whether in effect there is a special grant. So that there cannot be just a simple, casual going over to a new system.

THE COURT: You are not sufficiently computerized so that this can be done by feeding in basic criteria and having the machine doing it?

THE WITNESS: I must smile at the question. We are sufficiently computerized to have sometimes continuing confusion.

BY MR. ALBERT:

Q. I am sorry. I think I misunderstood your testimony on that also.

I believe I asked you if would make a difference to you to be told today that either the legislative amendments you know about or the present system will be the system in force on July 1st, then [122] to be told that in, sometime in May or June. Well, let me try to answer—

THE COURT: Excuse me. I did not understand the question.

Would the reporter read it back, please.

(Whereupon, the previous question was read back by the reporter)

THE COURT: Strike the question.

MR. ALBERT: I will rephrase the question.

Q. In terms of administrative havoc, would it make a difference to you to know that the law which now requires you to change over by July 1st may not be, may not be a valid law; to know that now as opposed to knowing it in June? A. Oh, yes, it would be.

It would create consternation, but it would be very helpful to have that consternation now than to be advised on June 1st that there is going to be a change.

Q. Were you advised on June 1st that that was the situation, would the checks going out in July be the checks reflecting the present law? A. I am sorry, Mr. Albert, I keep losing the sense of your questions.

Q. I am sorry.

[123] If you were to be told that the procedure now, the law of the State of New York which requires you to implement those reductions—is that your understanding of the law of New York today? A. My understanding is that I am charged by the current legislation, the new Public Assistance which starts on the 1st of July, if in fact I have a clear definition that it is going to happen, plus necessary administrative guidance which we have not yet received, we would be prepared to implement with the first checks what is currently a mandate by July 1st.

Q. If you were told on June 1st and not before that that law is invalid and you may not follow it on July 1st, would the checks going out reflect the present standards? A. I cannot answer that unequivocably one way or the other. It would depend on how far we have gotten on the business in changing the magnetic tapes, the systems, et cetera.

We might have gone past the point of no return, so, in fact, we reached that point and we could in fact not deliver the current checks.

THE COURT: I take it, though, from your testimony that you would prefer to have a final [124] decision from this Court, whether it be a single Judge or a three-Judge Court by the end of the first week in May, rather than some kind of a temporary restraining order now that might run on for at least a month or months while the case is continuing in this Court?

THE WITNESS: I want to respond, if I may.

Administratively, the most desirable thing for us would be to have a clear direction one way or another as early as we can get it.

The later we get it, the more administrative havoc it creates. The substantive factor is what the key issues are, rather than the administrative problems.

The substantive issue is what in effect has happened to the poor people of this city.

THE COURT: What would the cost per month be of the present system as against the new system, let us say, in July?

Supposing we ran over into the new period beginning July 1st to use the old system simply because the Court was not able to answer, because it was up on appeal or something like that?

THE WITNESS: The difference in very gross [125] terms is approximately an eight and a half per cent difference or lower cost with the new system.

THE COURT: What would the cost of the State be?

THE WITNESS: The cost of the State, let's see if I can do that for you right quickly.

We are spending approximately in public assistance at this point, in round numbers, about a billion dollars.

At this point, a twelfth of that, less eight and a half per cent would give us the figure.

THE COURT: What is it, approximately?

THE WITNESS: Let me try to do my arithmetic very quickly.

I think we would be talking somewhere in the neighborhood of somewhere around ten million dollars, where the City would be somewhere around a third of that.

THE COURT: Ten million dollars a month?

THE WITNESS: Yes. I may have to check that more carefully.

THE COURT: All right, thank you.

[126] THE COURT: Go ahead.

MR. ALBERT: No further questions at this time.

CROSS EXAMINATION

BY MR. WEINBERG:

Q. One or two question.

If the new statute mandated an increase for everybody on Welfare, and changed the standard in an appreciable way, wouldn't it require the same sort of administrative havoc or horror that you referred to? A. No. What I think I said is if we were advised in the first week of May we can produce by July 1st.

Q. That is purely a function of the time involved and not of the substantive changes of the value? A. If I get a change of signal in time, that is what I say.

Q. Isn't it a fact that this change in the amount of time that your department has within which to cooperate and make the necessary changes and not the direction in which the statute makes the individual amounts received by any one of the recipients— A. What you are saying is true, but I think there [127] is an overlay in this example, if applying a 6.3 increment across the board, that is one order of business. If you now have that review budget and pick out special grants, that is another order of business.

I would say that primarily we need two months to institute any major budget change across the board.

Q. You said it takes you about two months to change the amount that various welfare clients in New York are going to receive.

Let's talk about this. Suppose you were entitled, let's say, on June 1st, that the statute was going–had been declared invalid, and that you had to revert to the old system, in your direct testimony you used the words "havoc" and "consternation." Isn't it a fact that the amount every welfare recipient gets is on tape? A. Yes, as you change the budget you change the tape.

Q. You don't throw it away? A. You amend the tape.

Q. And wouldn't it be a simple matter to retain the existing tapes? A. The consequences would be to retape the whole case load.

[128] Q. Would it be more work to do that than change the tape? A. I wouldn't be in a position to answer that. I don't know that I am competent in that area.

Q. I am trying to learn myself now.

As I understand it, there are tapes which list each welfare recipient? A. I couldn't respond to you responsively, counselor. If we get a change in signals come June 1st, we are going to be in trouble and so are the poor people in the City.

Q. You are not answering my question. A. That is the only way I can answer it.

Q. You have tapes for each welfare recipient indicating how much they are going to get, and that tape reflects what the recipient gets at present, such as if he gets $100 a month, under the change that person is going to get a different amount, it might be higher or lower–you say it is going to take you two months in effect to tool-up for that change? A. That is correct.

Q. Suppose you were informed in the middle of that period, say on June 1st, that you had to retain the payments that were presently given under the [129] present statute. A. Yes?

Q. What I would like to know is how long it would take before you can issue checks at the present amount?

In other words, continue what you are now doing. A. If we haven't gotten to the point of changing the tape and we could retain our budget we would be able to do it.

If we had gone past the point of no return and in fact rebudgeted all clients, we would have serious difficulty in our ability to send checks out.

Q. Do you destroy the records of what you did in the past? A. We do not. We do an individual budgeting sheet for every client and this is done by the Budget worker and it is processed on the tape, amending the tape we have, changing the tape we have so that they come out in a different way when we plug in the computing system.

I will say to you clearly and simply that if we get a change that comes in the middle of that period there is a serious problem—serious difficulty for us to be able to go the old way or the new way.

[130] Q. You would have to go one way or the other; you would have to issue checks? A. Obviously, and the only check we can issue with confidence would be the check we were in the middle of preparing. If we were ready to start the new standard and if we had to go back to the current standard, we would have trouble.

If we continued right now with the assumption of maintaining the current standard, and June 1st advised we have to change it, we would have trouble. I am saying we need approximately two months to implement a responsible change.

Q. Commissioner, did I understand you correctly that it is your assumption that you are continuing now to pay the present payment after July 1st? A. No. Let's not put words in my mouth. Assuming that, you would have the same problem.

Q. You can straighten it out with the check the following month? A. With the consequence of what would happen to people in the meantime, plus an additional problem of laying on a rebudgeting process for the entire rebudgeting.

Q. Everybody would get a check and the check [131] for the subsequent month would contain the old amount? A. They might not be able to get the subsequent amount until the next pay period or the one after that. It might

take time to retool. There is no way, counsel, that you can walk away from the issue of administrative problems that would be raised around what flows out of changes in midstream.

MR. WEINBERG: I have no further questions.

REDIRECT EXAMINATION

BY MR. ALBERT:

Q. This rebudgeting is done, commissioner, is done with the individual welfare center around the City? A. Yes, individual workers and case loads and individual budget forms.

Q. Checks are issued from where? A. They are centrally made by the central office.

Q. The calculations are done where? A. The central office turns out the check based on the information that is supplied by the local center.

Q. Is it a fact that you have announced publicly that the cyclical grant to be issued on [132] July 1st is not going to be issued? A. That is correct.

Q. What steps will you have to take to insure it won't be issued, or effectuated– A. We have to pull out of our processing setup all the authorizations for each case that are entitled to receive that cyclical grant.

Q. That will involve the individual case workers also? A. That we probably will not have to use the individual case worker for.

Q. Under the present system, under the law as it now stands, is the obligation your's and your case workers to inform clients if they are asked certainly that the grant is lost or being reduced come July 1st? A. Yes.

Q. Does the law of New York require you to do that? As to what you understand.

MR. WEINBERG: Objection.

THE COURT: Sustained.

BY MR. ALBERT:

Q. If any client asked for things after July 1st that are being eliminated, would it be your obligation to answer that client– [133] A. It would be.

Q. That would continue to be the case from now right on through July 1st?

MR. WEINBERG: I object to any of these questions.

THE COURT: Yes. I don't think it is necessary. It is clear that is so.

That will be all on redirect?

Thank you, Commissioner, for your help.

Next witness.

MR. WEINBERG: Your Honor, I move to strike the testimony of both these witnesses, although they are distinguished gentlemen and experts in their field, as irrelevant.

THE COURT: It is relevant on the question of the jurisdiction of the Court.

Your motion is denied.

Do you have any witnesses?

MR. WEINBERG: Yes.

THE COURT: Let's have them, please.

K. Letter from Judge Weinstein to Chief Judge Lumbard (Document No. 20)

UNITED STATES DISTRICT COURT
Eastern District of New York
Brooklyn, New York 11201

Chambers of
Jack B. Weinstein
District Judge

By Hand

April 24, 1969

Honorable J. Edward Lumbard
Chief Judge, U.S. Court of Appeals,
Second Circuit
United States Court House
Foley Square
New York, New York

My dear Chief Judge:

Pursuant to section 2284 of title 28 of the United States Code, I enclose a copy of my memorandum and order filed today in *Rosado v. Wyman*, 69-C-355, recommending appointment of a three-judge court.

Your attention is respectfully called to the memorandum and attached temporary restraining order suggesting the desirability, from the point of view of all parties, of an early resolution of the issues in this case.

Very respectfully,

/s/ Jack B. Weinstein

L. Memorandum and Order of Judge Weinstein Convening a Three Judge Court and Issuing a Temporary Restraining Order (Document No. 21)

This is a class action to declare invalid section 131-a of the New York Social Services Law, effective July 1st of this year, fixing maximum benefits for certain classes of welfare recipients in the state. Plaintiffs, residents of Nassau County and the City of New York who are presently receiving welfare benefits which will be substantially reduced under the new law, have moved for a temporary restraining order. Defendants have moved for the convening of a three-judge court. For the reasons stated below, both motions are granted.

Plaintiffs allege that the New York statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Social Security Act of 1935, as amended, and the regulations of the United States Department of Health, Education and Welfare, conditioning receipt of federal aid and its use by the states in their welfare programs. In brief, it is the contention of plaintiffs that federal law requires New York State, if it is to participate in the federal welfare reimbursement program, to take into account increases in the cost of living in computing new benefit levels; that the new state statute violates federal standards by arbitrarily decreasing the sums permitted to be paid to welfare recipients and by arbitrarily discriminating against Nassau County residents in reducing their payments substantially below those available to New York City residents without any basis in cost-

of-living differentials; and that the new state law, if it becomes operative, will cause severe and irreparable harm to plaintiffs and their infant charges.

At this preliminary stage of the litigation it is important to note that plaintiffs are not contending that federal law or regulations require the states to provide any welfare benefits. The power of the legislature to determine how the state's resources should be allocated through the levying of taxes and the appropriations of state monies is not being challenged. Rather, it is plaintiffs' position that when a state chooses to participate in the federal welfare program and receives federal appropriations, it must comply with valid federal conditions.

We first address ourselves to the question of a three-judge court. The way the issues have been framed by the parties, they can be broken down into two questions: first, whether a three-judge court is required to hear plaintiffs' equal protection claim and, second, if a three-judge court would be required, whether it should be convened now or whether a single judge should first decide the statutory cost-of-living claim.

A three-judge court is necessary to hear plaintiffs' equal protection argument. It is clear that it raises a substantial federal question. The Supreme Court's opinion in *Shapiro* v. *Thompson,* —— U.S. ——, 37 U.S.L.W. 4333 (1969), decided this past Monday, establishes that the Equal Protection Clause has wide application in the welfare area and suggests that the purpose of conserving funds may not, in and of itself, support grossly dissimilar treatment between similarly situated individuals.

Plaintiffs allege that the classification of New York City residents separate and apart from non-City residents—particularly those in Nassau County—is an invidious dis-

crimination. It is contended that the distinction is not based on need since the cost-of-living for welfare recipients in Nassau County is equal to, or higher than, that in New York City. Under the present law Nassau County is grouped with New York City in determining the schedule of payments. Under the proposed law it is grouped with counties outside the City; as a result, welfare payments will be substantially lower than those for New York City residents. The differences are, it is argued, so far out-of-line with cost-of-living differences between the City and County as to constitute an irrational, invidious and unconstitutional discrimination. We cannot, on the record before us, say that this claim is frivolous.

The two arguments that plaintiffs present against convening a three-judge court on this issue are not persuasive. The fact that they are seeking a declaratory judgment rather than injunctive relief, in the circumstances of this case, is merely a semantical, not a practical, difference. A declaratory judgment would have an effect identical to an injunction. In their complaint plaintiffs ask for "such other relief" as is appropriate and the Court will have the power to grant an injunction. That one may be required is suggested by the fact that plaintiffs are now seeking a temporary restraining order.

The contention of plaintiffs that, so far as Nassau residents are concerned, a statewide statute is not under attack, is without merit. Challenged is the state's entire plan for setting levels of welfare payments. Plaintiffs' attack, if fully successful, may have an effect on welfare recipients in every county in the state.

The second question is whether this Court should refrain from convening a three-judge court until it decides the

statutory cost-of-living issue. Plaintiffs' argument that this is a separate and independent claim and that the statutory issue should be decided first, in an attempt to avoid reaching the constitutional issue, is normally persuasive. In this case, however, all parties agree that time is of the essence. Were the Court to decide the statutory claim first and decide it against plaintiffs, a three-judge court would then need to be convened. The delay would be costly to all concerned.

A three-judge court appears to be the appropriate vehicle for speedily resolving all the issues in this case so that uncertainty may be eliminated as soon as possible. A direct appeal to the Supreme Court would lie from a three-judge determination. That Court can move quite expeditiously in matters of this sort, particularly with regard to a stay. Should it subsequently be determined that a three-judge court was not required, the single judge's decision, as part of that three-judge court, would become the opinion of the Court.

We turn now to the question of whether a temporary restraining order should be granted pending the convening of a three-judge court.

Extensive briefing, argument, affidavits of the individual plaintiffs, and experts' testimony in Court requires a finding at this preliminary stage of the litigation that plaintiffs have a substantial probability of establishing the validity of their claims and the right to the remedies they seek, both provisionally and permanently. These findings, it should be emphasized, are not findings on the merits of the action.

Both sides have indicated that prejudice will result should section 131-a be declared invalid after administra-

tive action has been taken which would prevent the state from keeping the present system in effect on July 1st. Plaintiffs' testimony supports a provisional finding that the new statute will cause welfare recipients to lose funds required to keep them at the level of bare subsistence. The state's witness testified that, on the one hand, many recipients will receive higher payments under the new system and, should the state commence payments under section 131-a, the state will not be able to obtain reimbursement if the section is struck down. On the other hand, he stated, it will reimburse those whose payments were illegally reduced.

The sums involved are large. It is estimated that payments under the new system will be approximately $10,000,000. a month less than under the old. And in some cases reductions to welfare recipients run in the order of 20%. Thus, both the state and many welfare recipients may be irreparably harmed if payments made under the new statute are ultimately determined to be illegal.

Witnesses for both sides indicated that it would take between six to eight weeks to change from one system to the other. The state's testimony indicated that it was possible to prepare for the new system under section 131-a while being able to remain in a position to continue the present system should that be required. This could be done, state experts believe, by preserving the present electronic data processing tapes (or by making a copy of them), while making new tapes in planning for the new system. Since the plaintiffs' witness indicated that the City intends to proceed by modifying the present tapes, it is important that the state take steps for their preservation.

Accordingly, the Court is signi g and filing a temporary restraining order today and is w ting to the Chief Judge of this Circuit notifying him of is determination that a three-judge court ought to be c ened pursuant to section 2284 of title 28 of the Unite States Code. The Court is striking from the plaintiffs' l oposed order references to announcements to welfare r ipients. The Court can rely upon the good sense of all elfare officials to try to minimize the anxiety of welfare lients.

The twenty day period to an er expires on April 29, 1969. Because of the necessity or speed, this time will not be extended. Defendants an plaintiffs are advised to have their papers seeking summ y judgment and all other relief served and filed on April 9, 1969. The parties are granted until May 2, 1969 to bmit reply papers and briefs. All undecided motions w be referred to the three-judge court.

So ordered.

Dated: Brooklyn, New York
April 24, 1969

JACK B. WEINSTEIN
U.S.D.J.

M. Temporary Restraining Order Pending Determination by Three Judge Court (Document No. 19)

[Title Omitted in Printing]

Plaintiffs having moved this Court pursuant to Title 28, United States Code, Section 2284(3), for a temporary restraining order restraining Defendant Wyman from implementing and putting into effect the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law Section 131-a, added by Laws Ch. 184, March 31, 1969, and this motion having been considered by this Court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, the testimony taken in open court, and the hearings held to date; and upon the finding by this Court that (1) substantial questions have been raised by plaintiffs about the validity of said Section 131-a, insofar as it effectuates a reduction in the grant levels of public assistance, which require further consideration by a statutory three-judge court, and (2) New York State, its subdivisions and recipients of public assistance throughout the State of New York will suffer irreparable injury if the preparations which are made for implementation of said reductions will prevent the continuation of grants at present levels if this Court finds the reductions invalid, it is

ORDERED, ADJUDGED AND DECREED THAT, pending hearing and determination by a statutory three-judge court of the validity of the reductions in public assistance effectuated by said Section 131-a:

1. Defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Children program under State supervision (insofar as said officials have actual notice of this temporary restraining order) are hereby restrained from denying, reducing or discontinuing public assistance benefits pursuant to said Section 131-a.

Benefits which may not be denied, reduced or discontinued under this order include both regular recurring grants and special grants now available to public assistance applicants and recipients (including the quarterly "flat grant" in New York City and special needs grants throughout the State). Applications for regular and special grants shall be processed in the ordinary course of business without delay or interruption and shall be granted to all persons eligible under current standards, despite any provision to the contrary in said Section 131-a.

2. The Defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Children program under State supervision (insofar as said officials have actual notice of this temporary restraining order) may take steps to prepare for conversion to the reduced grants on July 1, 1969, provided that no such step will prevent continued and uninterrupted payments under the present system or some other valid system if Section 131-a is ultimately found invalid.

Dated: Brooklyn, New York
April 24, 1969

/s/ Jack B. Weinstein
U.S. District Judge

N. Designation of Three Judge Court by Chief Judge Lumbard (Document No. 22)

[Title Omitted in Printing]

Having been notified by the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281, pursuant to Title 28 United States Code

Section 2284 I hereby designate the following judges, in addition to the Honorable Jack B. Weinstein, to hear and determine said cause as provided by law: Honorable Leonard P. Moore, United States Circuit Judge, and Honorable Jacob Mishler, United States District Judge for the Eastern District of New York.

IT IS HEREBY ORDERED that this order be filed in the above entitled cause in the said District Court.

/s/ J. Edward Lumbard
Chief Judge, United States
Court of Appeals for the
Second Circuit

Dated: New York, N. Y.
April 25, 1969

O. Defendants' Answer (Document No. 28)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[Title Omitted in Printing]

Defendants, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, as and for an answer to the complaint herein, respectfully allege:

AS TO PLAINTIFF'S STATEMENT OF CLAIM:

FIRST: Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "12", and in the second sentence of paragraph "3", and the third sentence of paragraph "6".

SECOND: Deny each and every allegation set forth in paragraph "5" except admit that New York City commenced a demonstration project on the date alleged which eliminated special needs grants as alleged therein.

THIRD: Deny each and every allegation set forth in paragraph "8" except admit sub-paragraphs (b) and (c) thereof.

FOURTH: Deny each and every allegation set forth in sub-paragraphs (c), (d), (e) and (f) of paragraph "9" and respectfully refer this Court to the language of 42 U.S.C. 602-a § (23) referred to by plaintiffs.

FIFTH: Deny each and every allegation set forth in paragraphs "11" and "13", and sub-paragraph (b) of paragraph "10".

Defendants' Answer (Document No. 28).

AS TO PLAINTIFFS' FIRST CAUSE OF ACTION:

SIXTH: Deny each and every allegation set forth in the second sentence of paragraph "2" thereof.

AS TO PLAINTIFFS' SECOND CAUSE OF ACTION:

SEVENTH: Deny each and every allegation set forth in paragraph "2" thereof.

AS TO PLAINTIFFS' THIRD CAUSE OF ACTION:

EIGHTH: Deny each and every allegation set forth in paragraphs "2" and "3" thereof, except admit the discontinuance of the special needs grants referred to therein.

AS TO PLAINTIFFS' FOURTH CAUSE OF ACTION:

NINTH: Deny each and every allegation set forth in paragraphs "1", "5", "6", "7" and "8" thereof.

TENTH: Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "4" thereof.

AS TO PLAINTIFFS' FIFTH CAUSE OF ACTION:

ELEVENTH: Deny each and every allegation of paragraphs "1" and "2" thereof.

AS TO PLAINTIFFS' "FURTHER CLAIM FOR DECLARATORY JUDGEMENT":

TWELFTH: Deny each and every allegation set forth in paragraphs "1" and "2" thereof.

THIRTEENTH: Deny plaintiffs' allegation that defendant will cause "irreparable injury unless enjoined forthwith".

AS AND FOR A FIRST COMPLETE DEFENSE, DEFENDANTS ALLEGE:

FOURTEENTH: That this Court lacks jurisdiction over the subject matter herein.

AS AND FOR A SECOND COMPLETE DEFENSE, DEFENDANTS ALLEGE:

FIFTEENTH: That plaintiffs lack standing to institute this action as a class action under Rule 23, Fed. R. Civ. P. since they are not typical members of the class of which they assert themselves to be a part.

AS AND FOR A THIRD COMPLETE DEFENSE, DEFENDANTS ALLEGE:

SIXTEENTH: That this action should be dismissed for failure to join the Secretary of Health, Education and Welfare as a party defendant.

AS AND FOR A FIRST COMPLETE DEFENSE TO CAUSES OF ACTION 1 THROUGH 4, DEFENDANTS ALLEGE:

SEVENTEENTH: The conformity of New York Social Services Law § 131-a to the Social Security Act is presently being considered in an administrative proceeding within the United States Department of Health, Education and Welfare. That said Department has requested voluminous information of the New York State Department of Social Services in order to determine whether § 131-a so conforms.

Defendants' Answer (Document No. 28).

EIGHTEENTH: That said Department of Health, Education and Welfare has primary jurisdiction over this issue and that this Court therefore lacks jurisdiction over the instant action.

AS AND FOR A SECOND COMPLETE DEFENSE TO CAUSES OF ACTION 1 THROUGH 4, DEFENDANTS ALLEGE:

NINTEENTH: That in the year 1968, defendants fully complied with the requirements of 42 U.S.C. § 602-a (23) by adjusting the standard of need and maximum payments employed by the State of New York in conformity with that statute. That this adjustment was approved by the Department of Health, Education and Welfare of the United States. A copy of said adjustment schedules adopted thereunder and of the letter approving said adjustment by the Department of Health, Education and Welfare is marked Exhibit "A" annexed hereto.

TWENTIETH: That this constituted complete compliance with the requirements of § 602-a (23).

AS AND FOR A THIRD COMPLETE DEFENSE TO CAUSES OF ACTION 1 THROUGH 4, DEFENDANTS ALLEGE:

TWENTY-FIRST: That aside from the compliance in 1968 set forth in paragraphs "Nineteenth" and "Twentieth", *supra*, § 131-a completely complies with all applicable Social Security Act requirements.

AS AND FOR A FOURTH COMPLETE DEFENSE TO CAUSES OF ACTION 1 THROUGH 4, DEFENDANTS ALLEGE:

TWENTY-SECOND: That the alleged non-conformity of § 131-a to requirements of 42 U.S.C. § 602-a (23) is not a

ground for declaring the invalidity of, or enjoining, the statute since, even if proven, it could do no more than require exclusion of New York State from receipt of Federal grants under the Social Security Act.

AS AND FOR A FIFTH COMPLETE DEFENSE TO CAUSES OF ACTION 1 THROUGH 4, DEFENDANTS ALLEGE:

TWENTY-THIRD: That a rational basis exists for the disparity in maximum monthly grants and allowances as between New York City and the remainder of the State of New York.

WHEREFORE, defendants respectfully request judgment dismissing the complaint.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

(Verified by Philip Weinberg, April 28, 1969.)

P. Notice of Defendants' Motion for Summary Judgment and Statement Pursuant to Rule 9(g) (Document No. 26)

[Title Omitted in Printing]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Joseph H. Louchheim, duly sworn to the 28th day of April, 1969, and upon the pleadings herein, the exhibits annexed thereto and all the proceedings heretofore had herein, the undersigned will move this Court at a time and place to be fixed by this Court for an order under Rule 56 of the Federal Rules of Civil Procedure for summary judgment in favor of the defendants upon all of the grounds as set forth in the moving papers herein and for such other and different relief as to the Court may seem just and proper.

Dated: April 28, 1969.

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants

[Title Omitted in Printing]

STATEMENT OF NO MATERIAL FACTS
PURSUANT TO RULE 9(g)

Defendants contend that there is no genuine issue to be tried with respect to the issues in this case.

Dated: New York, N.Y.
April 29, 1969

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants

/s/ Philip Weinberg
Principal Attorney

Q. Affidavit of George W. Chesbro in Support of Defendants' Motion for Summary Judgment (and Exhibits A, C, F, G, I, J, K Thereto) (Document No. 26)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[Title Omitted in Printing]

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

GEORGE W. CHESBRO, being duly sworn, deposes and says:

I am the First Deputy Commissioner of Social Services of the State of New York and the acting Commissioner of said Department. I make this affidavit in support of the motion of the defendants for summary judgment in this action. This action seeks judgment declaring Social Services Law § 131-a, as enacted by Laws of 1969, ch. 184, to take effect July 1, 1969, to be invalid (1) as in conflict with Social Security Act provisions establishing eligibility for State participation in federal grants under the Aid to Dependent Children (herein "ADC") program, and (2) as violative of the equal protection clause of the Fourteenth Amendment. Neither of these contentions warrant the declaratory judgment or injunction sought by plaintiffs. There is no material issue of fact herein.

The ADC program is part of the Social Services program of the State of New York as established by the Social Services Law and administered by this Department. It is one of several programs operated by the State for the benefit of welfare recipients, including aid to the blind, home relief, aid to the disabled, and the like. Under Social Services Law § 131, which establishes the general

criteria for assistance, care and services to be given under these programs, it is "the duty of public welfare officers, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves." The test of adequacy under that statute "shall be the sufficiency thereof for maintenance in accordance with standards of public health in the community * * *," § 131(3). Pursuant to this statutory responsibility, the Department of Social Services has determined the adequacy of such assistance in all categories of public assistance through the computation from year to year of a standard of assistance. This standard is computed on the basis of the pricing of the component items which enter into the level of subsistence found to be necessary for a welfare recipient. These items include food sufficient to provide a well-balanced nutritional diet, as well as adequate clothing, household items, laundry and personal incidentals. A level of needs is arrived at by determining the cost of these components and under New York law includes the amount sufficient to cover all of these items, exclusive of rent and fuel for heating, which are added to the allowance of the recipient on a separate basis. The Department, on an annual basis, reprices these amounts, basing its revisions on the cost of food statistics supplied by the Bureau of Labor Statistics of the United States Department of Labor for the New York City and Buffalo areas—the only two such statistics available for this State. The average of these two districts is taken. As well as, pricing of specific items of food and other articles is done by Department representatives throughout the State. Utilities costs are supplied by the utilities companies serving various regions of the State and computed into the monthly allowance figure. Department regulations require a recomputation whenever the price level rises 2% or more.

Affidavit of George W. Chesbro, in Support of Defendants' Motion for Summary Judgment (Document No. 26).

Pursuant to this arrangement, in August, 1968, the Department computed a revised standard of assistance for various parts of the State. The State was divided into three regions and the amounts payable to welfare recipients were computed, based on cost of living increases, as follows (figures based on family of 4 receiving ADC):

SA-1	SA-2	SA-3
(New York City Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)	(All counties not in SA-1 or SA-3)	(Allegany, Cattaragus, Chautauqua, Erie, Genessee, Niagara, Steuben, Wyoming Counties)
$152-$221	$149-$218	$146-$215

The variation in these figures hinges on the age of the oldest child in the family. The price schedule is marked Exhibit "A" annexed hereto. The figures contained are exclusive of rent and fuel for heating which, as noted, are paid separately over and above the schedule allowance. The difference between the allowance for the three districts is the cost of utilities. In addition to the schedule allowance, special grants are available for items for special need—moving, security deposits, special diets and the like—as authorized by Department regulation § 352-5.

These allowances were arrived at by the Department following exhaustive analysis of the cost of all the component items. Pricing sheets illustrating the expenses attributable to various component items are marked Exhibit "B" annexed hereto. This State has since 1935, along with every other state, received substantial federal grants for welfare purposes pursuant to the Social Security Act. Section 602 thereof establishes criteria for participation in this federal aid. The Social Security Act imposes certain minimum requirements upon the state as a considera-

tion for receiving these federal benefits. The states must establish a standard of need, but no specific amount of payments is mandated and enacted. As we shall show, the actual level of payments varies widely as between the states. In 1968 Congress adopted § 602(a) (23), which requires the states to provide that by July 1, 1969 the amounts used to determine needs of individuals, and maximum dollar amounts of public assistance, if any, will have been adjusted to reflect fully changes in living costs since such amounts were established. This requires that as a condition of continuing to receive federal money, each state revise its standard of need by July 1, 1969, which New York had done periodically in any event. Federal regulations (45 CFR § 233.20[a]) interpreted this to mean that such adjustment was to be made within the period January 2, 1968 to July 1, 1969. New York complied with this statute on August 23, 1968 when it adopted, and the Secretary of Health, Education and Welfare (herein "HEW") approved, the schedules referred to as SA-1, SA-2, SA-3 (Exh. "A"). The letter sent to local Commissioners of Social Services throughout the State, by this Department, expressly stated (Exh. "A", p. 1):

> "The enclosed new schedules of public assistance allowance reflect a substantial rise in living costs that occurred during the year ending May, 1968."

Section 602(a)(23) required any states which imposed a maximum dollar amount on allowances paid to adjust such maximum amount. New York was not such a state.

This extraordinarily permissive federal statute contemplates the widest variety among state welfare systems. It was designed to permit states to pay allowances to recipients at levels which the states arrive at irrespective of the standard of minimum subsistence in that state. Thus a

state need not pay 100% of its own standard of need and many states do not. Whatever amount that state sees fit to pay is subsidized in large part by the federal government. A chart (Exh. "C" annexed hereto) shows that a majority of states pay far less than their own professed standard of need. Mississippi, for example, has a standard of need of $201 (figures as of April, 1968), yet pays only $55. Missouri has a standard of need of $305 and yet pays only $124. New York's level of $278 is exceeded by only three states of the fifty, and New York pays its full standard of need, $278 as of April, 1968.*

In 1968 the City of New York established a demonstration project, with the approval of this Department and HEW, which permitted it to eliminate special grants for clothing and household replacements and substitute therefor a cyclical grant of $100 per person per year. Creation of this project was requested by the New York City Department of Social Services in order to "result in a more equitable distribution across the total caseload of the funds for 'special needs' and recognize more directly the dignity of the client," and "relieve front line agency personnel from the cumbersome, demeaning, conflict-ridden, idiosyncratic, and administratively cost of client-by-client and item-by-item decision making". The City stated that it expected to provide a "model for the administration of assistance which, if validated, could be replicated within the State and elsewhere in the nation." A copy of the State's proposal for this simplified payment system, dated August 14, 1968, is marked Exhibit "D". It is to be noted that the City Department expressed its "firm belief that the nature of the urban crisis and the higher social cost of living

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* These figures include the components in each schedule of payments, together with rent and fuel for heating.

in the metropolitan center requires a differential assistance level in these areas" (Exh. "D", p. 4). Approval by this Department was based on the employment by the City of the flat grant approach to public assistance which avoids the necessity of the recipient requesting special grants on an individual basis. It is the judgment of enlightened Social Services administrators today that the flat grant concept enhances the dignity of the welfare client and permits him to budget more effectively, as well as reducing mushrooming administrative costs and freeing caseworkers for counseling and other professional duties.

In 1969 the State took a substantial step toward implementation of the flat grant approach. In keeping with its practice and responsibility of annual re-evaluation, it determined that administrative expenses could be substantially reduced and implementation of the flat grant approach advanced by the computing of the schedule of assistance to be furnished so as to end rigid categories based on the age of the oldest child and substitute therefor a simplified allowance schedule based on the average age of the oldest child in a given size household. This schedule was arrived at by adopting the 1968 upward revision based on the cost of living increase SA-1, SA-2, SA-3, Exh. "A", *supra*), and using the mean age of the oldest child in each size family as the basis for the amounts of allowance paid. Thus, for a family of 4, receiving public assistance, the computation of the Department reveals that the mean age of the oldest child is 10.09, as shown by the annexed charts (Exhs. "E" and "F"). The monthly allowance (exclusive of rent and fuel) for such a family of 4 with the oldest child of 10 or 11 is presently $191 in the SA-1 area (New York City, Long Island, etc.). The United States Government current estimate of the subsistence level for a family of 4 is $3,535 per year, including shelter

costs and medical care (free in New York State). Estimating the cost of shelter at approximately $1,000 per year or $83 per month and deducting that as separately allowed, for New York City, the annual amount of $2,500 was arrived at or $208 per month. This represents an addition of $17 for a family of 4 ($4.25 per person) to the present $191. This increment is an approximation of the amounts presently paid under the New York City cyclical grant, to be discontinued under the new law. This figure of $208 for a family of 4 became the New York City standard of asistance and was embodied in § 131-a as enacted by the Legislature to constitute the schedule of public assistance to be paid as of the effective date of the statute, July 1, 1969.

The standard for the remainder of the state was computed in similar fashion, the differential being $25 for a family of 4 or an allowance of $183 a month, again exclusive of rent and fuel. The Legislature determined to provide flat grants in keeping with the most progressive and enlightened practice in the Social Services administration field in order to minimize administrative cost and to provide maximum allowances for recipients in this period of rapidly increasing numbers of recipients.

The mean age was used in these computations instead of the median, a decision which increased the allowances substantially, as the chart (Exh. "F") shows, since in families of 2 to 5, where the overwhelming majority of recipients lie, the mean is older. In addition, wherever the mean constituted a fraction, the allowance used as its base the higher of the two figures.

In addition to the manifest advantage of eliminating administrative costs and enhancing the dignity of recipients by moving to a flat grant standard, this statute also ended the necessity of reprocessing grants for each family as the

oldest child in that family arrived at a new payment level every two years. It was the experience of the Department that many instances of underpayment resulted from the time lag in reporting and processing these age increases. A uniform statewide standard of payments outside New York City was adopted as a means of promoting uniformity and reducing administrative expense, which provides the added advantage of freeing Department and local caseworkers from bookkeeping burdens, as well as the investigation of the needy for special grants, to permit them to use this time for counseling purposes.

The schedule of grants established by § 131-a is:

Number of Persons in Household

	One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*	*Each Additional Person*
New York City	$70	$116	$162	$208	$254	$297	$340	$43
Other Counties	$60	$101	$142	$183	$224	$257	$290	$33

Because the basis of the new schedule is the mean age of the oldest child, replacement of the previous administratively-determined schedules with these statutory flat grants will provide approximately the same level of allowances as was established when the Department made the

1968 cost of living adjustment on which these figures are based. The following chart shows the anticipated effect of § 131-a on the actual amounts to be received by recipients, exclusive of rent and fuel:

	Increase	*Decrease*	*No Change*
New York City	41.5%	58.1%	.04%
Other Counties	49%	51%	....

The schedule of grants, it must be emphasized excludes rent and fuel, which are allowed separately. These amounts are, of course, continually increasing and must be calculated as part of the Department's total expenditure of welfare allowances although not reflected in the grants established by the statute. The following chart demonstrates average rent increases (Bureau of Labor Statistics figures):

	New York City	*Buffalo*
Increase Feb. 1967-Feb. 1968	2.24%	1.74%
Increase Feb. 1968-Feb. 1969	3.16%	2.85%

Median rents in New York City have increased from $74 in 1960 to $85 in 1965 and $96 in 1968, a 13% increase in the past three years. The average rent for a welfare family of 4 as of 1968 is $83.90 in New York City, the figure used in arriving at the $208 monthly in the statute. See p. 7, *supra.*

In addition to the statutory grants, rents and fuel, the Department is in the process of arranging for the absorption of other expense of welfare recipients, previously paid for through special grants, such as moving, security deposits, etc. on a precharge of services basis under which the local Department will pay outright for these services over and above the grant to the recipient. This too will inure to the benefit of the recipient over and above the

grants. By letter dated April 16, 1969, HEW, as part of its administrative proceeding pursuant to 42 USC § 601 to determine whether or not to approve the level of benefits contained in § 131-a, has requested the Department to provide information in detail as to numerous facets of the new statute. A copy of this letter is annexed hereto as Exhibit "G".

The Department's reply to this letter is in the process of preparation.

Plaintiffs' contention here that § 131-a is violative of the requirements of § 602(a)(23) will of necessity be one of the subjects passed on in the administrative determination to be made by HEW. It is plain, however, that the adoption of SA-1, 2 and 3 in August, 1968 based on a complete readjustment on levels of benefits throughout the State in order to reflect cost of living increases, constituted complete compliance with that statute, and that § 131-a maintains this level with adjustments made to achieve administrative simplicity and streamline the process of computing allowances in order to free employees for counseling duties, and improve the self-respect of the recipient by ending the need to request special grants. The Legislative finding made when § 131-a was enacted (L. 1969, ch. 184, § 1), specifically states:

> "A uniform schedule of monthly grants and allowances will promote greater uniformity and equality of treatment of the recipients of public assistance, meet the needs of our less fortunate citizens and simplify and reduce the administrative detail. This will release caseworkers for the more important task of providing casework services to restore recipients to the dignity of self-sufficiency. The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of

maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter."

Likewise, the Report of the Joint Legislative Committee To Revise the Social Welfare Law of New York State (1969 Leg. Doc. 9) specifically referred to the state's concern over the size of caseloads of Social Services employees—a problem, it is anticipated, which will be materially lessened by reduction in processing which should be possible when special grants are eliminated.

Section 131-a (5) explicitly requires annual determination by the Department of changes in the cost of living and a report thereof to the Legislature. This is not merely a one-time requirement for adjustment based on the cost of living as was provided for by § 602(a) (23), but an express Legislative mandate for determination by the Department and consideration by the Legislature of the cost of living on an annual basis in order to maintain flexibility in keeping the amounts of grants keyed to the cost of living.

Plaintiffs also challenge the distinction in payments as between New York City welfare recipients and those in the remainder of the state as violative of the equal protection clause. Previously the State had been divided into three categories by counties.* As we have seen, Bureau of Labor Statistics figures and Department computations were used to determine the statewide standard. Then utility costs were computed and the State divided into three

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* A few cities and one town constitute separate Social Services districts.

areas based solely on disparities on such costs. This created distinctions between essentially similar areas. Thus, the Cities of Buffalo, Rochester and Syracuse were each in a different category and recipients therein received different allowances. In reality, levels of public assistance varied substantially within the State despite the apparent similarity in allowance levels. The Department's 1968 figures indicate the following wide variance in real payments made (exclusive of rent and fuel):

MONTHLY AVERAGE PAYMENTS PER RECEIPT

	New York City	*Suburban Counties*	*Urban Upstate Counties*	*Remainder of State*
ADC	$72.28	$69.32	$50.51	$39.07
ADC-Unemployed Fathers	$72.89	$57.68	$42.40	$34.92
Medical Assistance	$123.57	$91.55	$69.65	$57.48
Home Relief	$43.68	$39.53	$27.54	$20.11

These figures reflect a pattern of substantial higher amounts received by New York City welfare recipients, more than double the average received in rural counties in many categories of public assistance. This results from the wide variety of practices of local districts regarding special grants, the greater availability of information in New York City, greater accessibility of welfare offices, the recipients' attitude toward welfare and their degree of organization, their resultant sophistication and willingness to take advantage of opportunities within the system.

Consequently, when consideration of the standards embodied in § 131-a took place, the Legislature determined to provide a higher standard for New York City to reflect

this real differential, accurately described by the City Department as a function of "high social cost of living in the urban center" (Exh. "D", p. 4). The Department's experience has shown that the results are that New York City welfare recipients' actual expenses substantially exceed those of recipients in the remainder of the State. This is due to their higher level of aspiration, greater expectations, the effects of living in a great metropolitan center, and the availibility of and need for more recreational facilities than in a suburban or rural environment where children have more space in which to play. New York City life, realistically, in the experience of the Department, includes transportation to beaches, museums, and parks. It includes a higher crime rate which requires safety locks, greater loss of money and material through burglaries, as well as higher laundry expenses due to soot and the like.

Moreover, the Legislature was plainly entitled to consider the sheer number of welfare recipients for New York City—889,000 out of 1,211,000 in the State* and in the ADC program 657,000 out of 887,000. It is undeniable that the City warrants special consideration and the Legislature was simply recognizing this fact. In New York City per capita welfare expenditures per total population amounted to $66.12; the statewide average is $39.12 and, by comparison Nassau County is $13.83. Not one of the 57 counties outside New York City was above the statewide average figure. A chart setting forth these averages is Exhibit "H", annexed hereto.

The resultant legislative determination was to establish separate schedules for New York City and for the re-

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* 1968 monthly average; Department figures.

mainder of the State, in keeping with the traditional legislative distinction between the City and the remainder of the State exemplified by the Multiple Dwelling Law, numerous provisions of the Code of Criminal Procedure, the structure of the courts, and others. It was particularly appropriate where the vast majority of welfare recipients are within the City and where it would have been difficult administratively to intelligently draw the line between the various counties outside the City which would have matched allowances to the actual cost of living in that county. It is to be noted that in this State the Bureau of Labor Statistics cost of living figures are computed only for New York City and Buffalo.

This statute constituted a legislative method of adopting current cost of living standards while reducing time and effort spent in investigation and calculation of individual amounts of allowances, a process wasteful of time and money and found by the Department to be degrading to the recipient, as well as subject to the vagaries of caseworkers, their supervisors and local administrators. The statute must be viewed in the context of fiscal realities. New York's payments to ADC recipients are the highest in the United States (see chart, Exh. "I", annexed hereto). New York pays eight times the sum provided by Mississippi and more than double the amount paid by any of the southeastern or south central states. The proportion of New York's population receiving ADC is likewise the highest in the country (see chart, Exh. "J") as is the amount expended per inhabitant for ADC payments (see chart, Exh. "K"). This amount is more than double that of 46 of the 49 other states. The number of people receiving ADC allowances is also rapidly increasing from year to

year. New York City shot from 360,000 to 600,000 between January, 1966 and July, 1968 (see chart, Exh. "L").*

New York also receives the minimum federal assistance of 50% of its public assistance, in contrast to many states which receive as much as 65% under the sliding scale of federal payments established by 42 USC § 603, which in effect substantially subsidizes those states paying the skimpiest allowances (see chart, Exh. "M").

In the light of these statistics, the Legislature was plainly reasonable in acting to reduce administrative expenditures inherent in the special grant approach and substituting the simplified flat grant method. This was in full conformity with applicable federal law and plaintiffs' challenge to the statute must fail.

WHEREFORE, your deponent respectfully prays that the instant motion for summary judgment in favor of defendants be granted in all respects.

(Sworn to by George W. Chesbro, on April 28, 1969.)

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* **Figure 2**, Staff Report to Joint Legislative Committee To Revise Social Services Law, prepared by Lawrence Podell, Ph. D., Professor, Center for Study of Urban Problems, Bernard M. Baruch College, City University of New York, Nov. 1968.

Exhibits A, C, F, G, I, J, K attached to Chesbro Affidavit
(Document No. 26)

Exhibit A (page 1)

Date 8/23/68
Regs. No. 68 M9-28

SCHEDULE SA-1

NEW YORK CITY - COUNTIES OF: Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester.

SIMPLIFIED ALLOWANCE SCHEDULE - Food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry, and sales taxes.

MONTHLY

	One Person	Two Persons	Three Persons	Four Persons	Five Persons	Six Persons	Seven Persons	Eight Persons	Nine Persons	Ten Persons
Oldest child 5 years of age or under		94	* 125	* 152	* 180	* 204	* 234	* 262	* 293	* 320
Oldest child 6 or 7		107	* 138	* 165	* 192	* 216	* 246	* 275	* 304	* 332
" " 8 or 9		107	152	* 178	* 205	* 228	* 259	* 288	* 317	* 344
" " 10 or 11		107	152	191	* 218	* 240	* 271	* 300	* 329	* 356
" " 12 or 13		118	162	201	240	* 262	* 292	* 321	* 351	* 378
" " 14 or 15		118	173	211	250	283	* 314	* 343	* 372	* 400
" " 16 or 17		118	173	221	259	293	335	* 364	* 394	* 421
" " 18 or 19		118	173	221	269	302	345	386	* 415	* 443
" " 20 or 21		118	173	221	269	312	354	395	437	* 464
Adults	66	110	156	198	238	274				

* When there is more than one adult in households with an asterisk, add $16 for each additional adult.
For a pregnant woman in any size household, add $5.50.
For an AABD recipient living alone, add $8.
For each AABD recipient in a family group, add $5.
For each additional person over ten in the household, add $32.
Any recipient under age 21 is budgeted as a child unless he is receiving assistance as the parent of a minor child and is not regularly attending school. When not budgeted as a child, such minor is budgeted as an adult

Regulation No. 134
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SCHEDULE SA-2

COUNTIES OF: Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Oneida, Onondaga, Ontario, Orange, Orleans, Oswego, Otsego, Putnam, Rensselaer, Rockland, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates.

SIMPLIFIED ALLOWANCE SCHEDULE - Food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry, and sales taxes.

MONTHLY

	One Person	Two Persons	Three Persons	Four Persons	Five Persons	Six Persons	Seven Persons	Eight Persons	Nine Persons	Ten Persons
Oldest child 5 years of age or under		91	* 122	* 149	* 176	* 200	* 230	* 259	* 289	* 317
Oldest child 6 or 7		105	* 135	* 162	* 189	* 212	* 242	* 271	* 300	* 328
" " 8 or 9		105	148	* 175	* 201	* 224	* 255	* 283	* 313	* 340
" " 10 or 11		105	148	188	* 214	* 236	* 267	* 295	* 325	* 352
" " 12 or 13		115	159	198	226	* 258	* 288	* 317	* 347	* 374
" " 14 or 15		115	169	208	246	280	* 310	* 339	* 368	* 395
" " 16 or 17		115	169	218	255	289	331	* 360	* 390	* 417
" " 18 or 19		115	169	218	265	298	341	382	* 411	* 439
" " 20 or 21		115	169	218	265	308	350	391	433	* 460
Adults	63	107	153	194	234	270				

* When there is more than one adult in households with an asterisk, add $16 for each additional adult.
For a pregnant woman in any size household, add $5.50.
For an AABD recipient living alone, add $8.
For each AABD recipient in a family group, add $5.
For each additional person over ten in the household, add $32.
Any recipient under age 21 is budgeted as a child unless he is receiving assistance as the parent of a minor child and is not regularly attending school. When not budgeted as a child, such minor is budgeted as an adult

Date 8/23/68
Trans. No. 68 MS-28

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Exhibit A (page 3)

SCHEDULE SA-3

CITY OF JAMESTOWN - COUNTIES OF: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben, Wyoming.

SIMPLIFIED ALLOWANCE SCHEDULE - Food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry, and sales taxes.

MONTHLY

	One Person	Two Persons	Three Persons	Four Persons	Five Persons	Six Persons	Seven Persons	Eight Persons	Nine Persons	Ten Persons
Oldest child 5 years of age or under		88	* 119	* 146	* 173	* 197	* 226	* 255	* 284	* 312
Oldest child 6 or 7		102	* 132	* 159	* 185	* 209	* 240	* 267	* 296	* 324
" " 8 or 9		102	146	* 172	* 198	* 221	* 251	* 280	* 309	* 336
" " 10 or 11		102	146	185	* 210	* 233	* 263	* 292	* 321	* 348
" " 12 or 13		113	156	195	233	* 255	* 284	* 313	* 342	* 370
" " 14 or 15		113	166	205	242	276	* 306	* 335	* 364	* 391
" " 16 or 17		113	166	215	252	286	328	* 356	* 386	* 413
" " 18 or 19		113	166	215	262	295	337	378	* 407	* 434
" " 20 or 21		113	166	215	262	304	346	387	429	* 456
Adults	60	105	150	192	231	267				

*When there is more than one adult in households with an asterisk, add $16 for each additional adult.
For a pregnant woman in any size household, add $5.50.
For an AABD recipient living alone, add $8.
For each AABD recipient in a family group, add $5.
For each additional person over ten in the household, add $32.
Any recipient under age 21 is budgeted as a child unless he is receiving assistance as the parent of a minor child and is not regularly attending school. When not budgeted as a child, such minor is budgeted as an adult.

Effective 8/23/68
Trans. No. 68 HS-28
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Page No. 61

SCHEDULE SA-4

FOR ALL AGENCIES - WITHOUT UTILITIES

SIMPLIFIED ALLOWANCE SCHEDULE - Food, clothing, personal incidentals, household supplies, school expenses, laundry, and sales taxes.

MONTHLY

	One Person	Two Persons	Three Persons	Four Persons	Five Persons	Six Persons	Seven Persons	Eight Persons	Nine Persons	Ten Persons
Oldest child 5 years of age or under		82	* 111	* 138	* 164	* 188	* 216	* 245	* 273	* 300
Oldest child 6 or 7		96	* 124	* 151	* 176	* 200	* 228	* 257	* 284	* 313
" " 8 or 9		96	138	* 164	* 189	* 212	* 241	* 269	* 298	* 325
" " 10 or 11		96	138	177	* 201	* 224	* 253	* 282	* 310	* 337
" " 12 or 13		106	148	187	224	* 246	* 274	* 303	* 331	* 358
" " 14 or 15		106	158	197	233	267	* 296	* 325	* 353	* 380
" " 16 or 17		106	158	207	243	277	317	* 346	* 374	* 402
" " 18 or 19		106	158	207	253	286	327	368	* 396	* 423
" " 20 or 21		106	158	207	253	295	336	377	417	* 445
Adults	54	98	142	184	222	258				

* When there is more than one adult in households with an asterisk, add $16 for each additional adult.
For a pregnant woman in any size household, add $5.50.
For an AABD recipient living alone, add $8.
For each AABD recipient in a family group, add $5.
For each additional person over ten in the household, add $30.
Any recipient under age 21 is budgeted as a child unless he is receiving assistance as the parent of a minor child and is not regularly attending school. When not budgeted as a child, such minor is budgeted as an adult.

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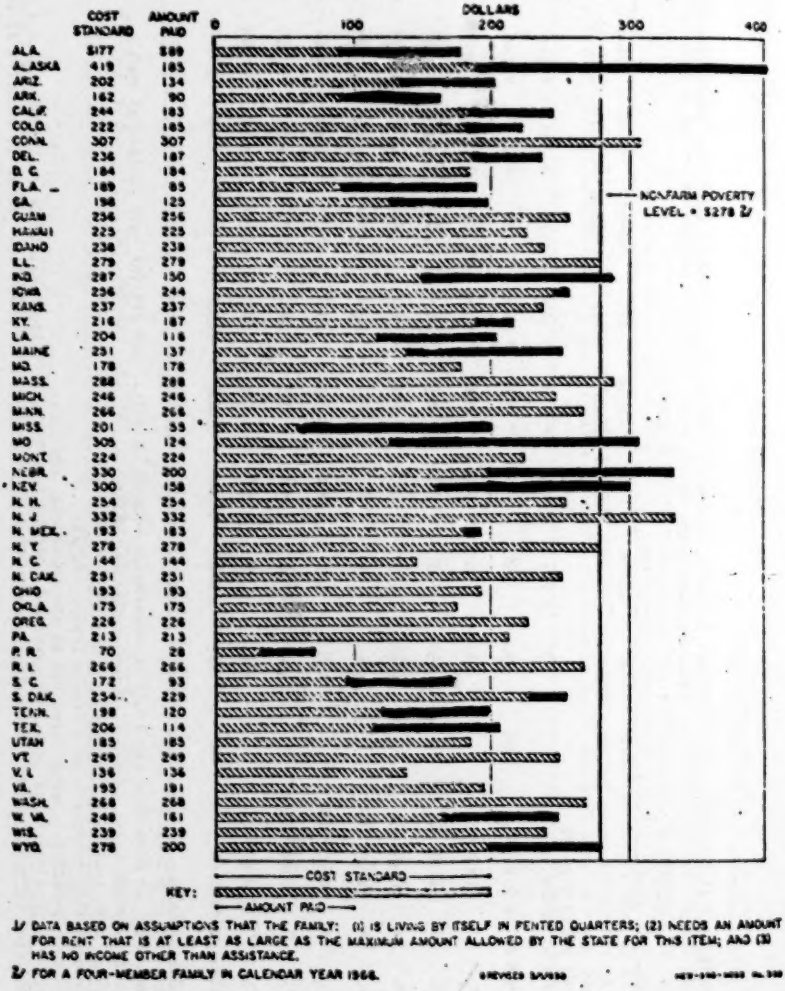
Exhibit C

CHART 2.

AID TO FAMILIES WITH DEPENDENT CHILDREN: MONTHLY COST STANDARD FOR BASIC NEEDS OF A FAMILY CONSISTING OF FOUR RECIPIENTS AND AMOUNT PAID TO SUCH FAMILY, BY STATE, APRIL 1968 1/



1/ DATA BASED ON ASSUMPTIONS THAT THE FAMILY: (1) IS LIVING BY ITSELF IN RENTED QUARTERS; (2) NEEDS AN AMOUNT FOR RENT THAT IS AT LEAST AS LARGE AS THE MAXIMUM AMOUNT ALLOWED BY THE STATE FOR THIS ITEM; AND (3) HAS NO INCOME OTHER THAN ASSISTANCE.

2/ FOR A FOUR-MEMBER FAMILY IN CALENDAR YEAR 1966.

Exhibit F

Standards of Assistance

Number in Assistance Group

	1	2	3	4	5	6	7	8	9	10
Oldest Child										
Median Age	12.2	5.54	7.39	9.57	11.55	13.33	14.31	15.03	14.91	16.07
Mean Age	11.48	7.54	8.67	10.09	11.55	12.97	13.90	14.45	14.75	15.95
68 SA-1	65	107	152	191	240	262	314	343	372	421
Increase	4.25	8.50	12.75	17.00	21.25	25.50	29.75	34	38.25	42.50
Total	70	116	165	208	261	283	344	377	410	464
N.Y.C. Standard	70	116	162	208	254	297	340	383	425	469

Exhibit G

April 16, 1969
Re: Chs. 184, 186, 187 of
the 1969 Laws: A. 6935

Mr. George K. Wyman
Commissioner
State Department of Social Services
P. O. Box 1740
Albany, New York 12201

Dear Mr. Wyman:

This is in response to your request for our review of legislation recently enacted in New York State relative to the Public Assistance and Medical Assistance Programs. We are addressing ourselves in this communication to what appear to be the most significant questions raised with respect to Federal implications, in these measures. We are continuing our review of this legislation and, if necessary, we will communicate with you further with respect to any other matters which would appear to merit your careful attention in implementation.

Ch. 184—Section 1 and 5—Maximum Monthly Grants and Allowances

Our primary question as to these sections relates to their operation and effect in the AFDC program. As you know, section 402(a)(23) of the Social Security Act, which became effective January 2, 1968, requires that "by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." This requirement is reflected in the

provisions of SRS Program Regulation 20-7, section 233.20(a)(2)(ii). Section 131-a of New York's Social Services Law as amended establishes schedules of maximum monthly grants and allowances. This provision will raise a question of conformity with the Federal requirements unless the State can establish the following:

(a) That the State has a need standard in effect in its AFDC program on July 1, 1969 which has been adjusted since January 2, 1968 to reflect fully changes in living costs;

(b) That the maximums mandated by the statute reflect the required proportionate adjustment to the adjusted standard of need;

(c) That payments in the AFDC program will be based on need or a ratable reduction arrived at by methods applied uniformly throughout the State.

The statutory maximums are in flat amounts according to the number of persons in the household. In order to evaluate State's compliance with section 402(a)(23) of the Social Security Act we will need full information as to the relationship, if any, between the new maximums and the methods previously applied in determining the standard of need (and payment) in New York's AFDC program. We will also need supporting data in your plan materials for all of the Public Assistance programs demonstrating that the differentiation in maximums between New York City and all other areas of the State is not inconsistent with statewideness requirements.

We have further noted the provision in section 131-a(4) that local districts are to be permitted, with your approval, to adopt "a schedule of monthly grants and allowances for lesser amounts than established by the regulations of the department, subject to (the maximums) if . . . (it is estab-

lished) to the Commissioner that in such district the total cost of the items required to be provided and reflected in the schedule, actually is less than the schedule of monthly grants and allowances established by the regulations of the department."

In this connection, we would call your attention to the provisions of the above-mentioned Program Regulation 20-7 which require that all State plans for OAA, AFDC, AB, APTD, or AABD must specify a statewide standard to be used in determining need and the amount of the assistance payment which will be uniformly applied throughout the State. (S233.20(a)(2)(1), (iii)). While variations in amounts used in determining need and payments may be justified on the basic of differences in the cost of living in local areas, this is a factor to be taken into consideration in establishing the statewide standards which could then be applied uniformly in all areas with the same characteristics. Section 131-a(4), however, would appear to allow variations based on consideration of conditions in one locality alone without regard to its relationship to other localities within the State. Accordingly, unless this section may be interpreted as permitting you to establish standards for granting of a local variance which would allow its application in a manner consistent with uniform application of a statewide standard, a question of conformity with Federal requirements may be presented.

Ch. 184, Section 8—Special Provisions to Avoid Abuse of Assistance and Care

By virtue of establishment of a presumption that any applicant for AFDC who entered the State within one year prior to the date of application entered the State for the purpose of receiving public assistance or care, this section requires any such applicant to prove as a condition to his

establishment of eligibility that his entry was not for such purpose. Of course, such provision must be implemented consistently with the requirement of section 402(b) of the Act that aid must be provided where the family has resided in the State for one year, irrespective of the purpose of coming to the State, and aid must be provided with respect to an otherwise eligible child who has resided in the State for one year immediately preceding the filing of an application regardless of when the applicant relative entered the State. We would add that any acceptance of this provision is based on the authorization of durational residence requirements under the Social Security Act.

You may wish to consider whether the establishment of a presumption which would require the applicant to prove that he did not intend to claim assistance at the time he entered the State is supportable as a reasonable condition of eligibility. While a condition which excludes from eligibility those individuals with less than one year's residence who have been found to have entered the State with the intention of claiming assistance might be viewed as establishing a lesser disqualification than an absolute residence requirement and therefore as being comprehended within the statutory authorization of residence requirements, the accomplishment of such effect through operation of a presumption against the applicant introduces an additional factor which could possibly affect the ultimate determination as to its reasonableness and equitable treatment. We recognize that consideration of this question involves a balancing of many factors including the tests which will be applied in determining the degree and type of proof required to overcome the presumption, and therefore are not suggesting any conclusion on the basis of the legislative language alone. Rather, we are calling this to your attention at this time to assure that the fullest possi-

ble consideration is given to all possible ramifications of this provision in your planning for its implementation on May 1. Implementing plan material would have to assure that that provision can be administered in accordance with objective standards.

We would also appreciate your advice as to the intent of, and effect to be given to, the requirement that such an applicant submit with his application a certificate from the local employment office stating that such office has no order for an opening in work of any kind to which such applicant could properly be referred. If it is intended that the absence of such certificate would necessarily lead to a denial of the application, we have some question as to whether this would constitute a reasonable condition of eligibility, inasmuch as the existence of job openings does not necessarily mean that the applicant can obtain a job, and has no need for assistance. Thus, the applicant might well be unable to produce such a certificate because there are openings to which he or she can be referred and he or she may, in fact, have pursued such referrals without success. If the section would require denial in such case, it would appear to be unreasonable. A similar question would be raised if the provision would require denial of assistance where a responsible relative is unable to accept employment to which he has been referred because of inability to arrange adequate day care for the children. Similar comments apply to §133(4)(a) as amended by section 4 of Ch. 184, providing that no assistance shall be given to an employable person if he fails to file every two weeks a certificate that the employment office has no order for an opening in employment in which he is able to engage.

Furthermore, we assume that the requirement in section 139-a(2) that a determination be made within thirty days is intended for the protection of the applicant only and that

it is not intended to and would not have the effect of placing any time limitation on the applicant's opportunity to submit evidence or otherwise take whatever steps are necessary to prove his intent.

Ch. 184, Section 16—Limitation on Nursing Home Care

This section appears to provide, with respect to the medically needy, that care in nursing homes operated by a State agency will be provided without limit of days, whereas care in other nursing homes will be limited to 100 days during any spell of illness, subject to an extension of 100 days in cases of clear need for extended care. This provision thus establishes that the amount of nursing home care provided under the statute is 365 days a year if needed. A question is raised under section 1902(a)(1) and (8) of the Social Security Act which requires that assistance provided under the plan shall be furnished to all eligible individuals in the State who need it. Is there any assurance that there are sufficient available nursing home beds in State facilities to accommodate all eligible individuals who need care beyond 100 (or 200) days? In addition, a serious question will be presented under section 1902(a)(23), effective July 1, 1969, which provides that any individual eligible for medical assistance may obtain it from any institution qualified to perform the services required. Where an individual needs year-round nursing home care, he would not seem to have "freedom of choice" of institution if the State will support the needed care only in State-operated facilities.

Furthermore, even if the limitations on nursing home care were otherwise acceptable we would need information on the circumstances under which individuals who are medically needy and require care beyond the limited number of days may qualify as categorically needy. We would need

assurance that individuals who can pay for some but not all of their nursing home care will be eligible for payment of the balance after their "excess" income and resources have been applied.

Ch. 184, Section 16—Determination of the Scope of Services Available Under Title XIX

In this respect, we would appreciate your verification of the fact that the changes with respect to the amount, duration and scope of services will not result in a reduction from the level of care available to the categorically needy under your assistance plans as in operation prior to establishment of the Medicaid program. (Sec. 1902(c) of the Act)

Ch. 184, Section 20—Freezing Rates of Payment for Hospital and Health-Related Services

A serious question as to the conformity of your Title XIX plan with Federal requirements is raised by the provisions of this section, which became effective March 30, 1969, and which will require that the payment for hospital and health-related services provided to Title XIX recipients be made until June 30, 1971 at the rate of payment, established pursuant to section 2807 of the Public Health Law, which was in effect on March 31, 1969. As you know, section 1902(a)(13)(D) of the Act requires that a State plan provides for payment of the reasonable cost of inpatient hospital services. A requirement that payment for such services be made for over a two-year period at a fixed rate, not subject to adjustment, which was established on the basis of costs at the beginning of the period, would clearly restrict the flexibility needed to assure that payments made are related to costs incurred by the provider.

Furthermore, as is set forth in Program Regulation 40-4, the State agency is required to relate its payments for

inpatient hospital services to the principles and standards applied in determining reasonable cost under the Title XVIII program. (S250.30(b)) There must be payment of current reasonable costs, using interim payments and annual retroactive adjustments, or else making current payments designed to meet in full the anticipated current reasonable costs. Accordingly, it appears that payment at not to exceed a fixed rate, until June 30, 1971, would raise a question of compliance with the Federal statutory and regulatory requirements.

Ch. 186, Section 3.—AFDC—Provision of Assistance in Relation to Court Orders for Support

In this connection, we would call your attention to the fact that this amendment to section 350 of the Social Services Law, requiring that "allowances shall not be granted in whole or in part in anticipation that support payments required to be made by a parent pursuant to (court) order . . . will not be made," will have to be implemented in a manner consistent with the basic assistance principle that only income which is actually available to the individual may be considered in determining need. As set forth in Program Regulation 20-7, the State plan for AFDC must provide that agency policies assure that when support payments by absent parents have been ordered by a court, a regular amount of income is available monthly to meet the determined needs of the mother and children, whether or not the support payments are received regularly, and the agency does not delay or reduce public assistance payments on the basis of assumed support which is not actually available. (S233.20(a)(3)(v))

A. 6935—Medicaid Co-Insurance Provision

This provision states that the 80 percent limitation on payment for medical care and services furnished as m[illegible]al

assistance to the medically needy is inapplicable only where the individual's "expenditures for *such* medical care and services (i.e., care included within the Title XIX plan) have reduced (his) income and resources to *the level* of eligibility for public assistance." (Emphasis supplied). The acceptability of this provision will be dependent on whether it may be implemented in a manner consistent with the basic Federal requirements that consideration of an individual's income for purposes of determining financial eligibility for medical assistance take into account the costs incurred for medical insurance premiums and for necessary medical or remedial care recognized under State law and not encompassed within the State plan for medical assistance, and that any deductible or cost sharing may not be imposed to the extent that it would reduce the individual's income below the most liberal money payment standard used by the State, at any time on or after January 1, 1966, as a measure of financial eligibility in any categorical money payment program. (Social Security Act, S1902(a)(i4), (17): Program Regulation 40-7, S248.21(a)(1)(ii), (2)(ii))

Sincerely,

JAMES CALLISON
James Callison
Regional Commissioner

Exhibit I

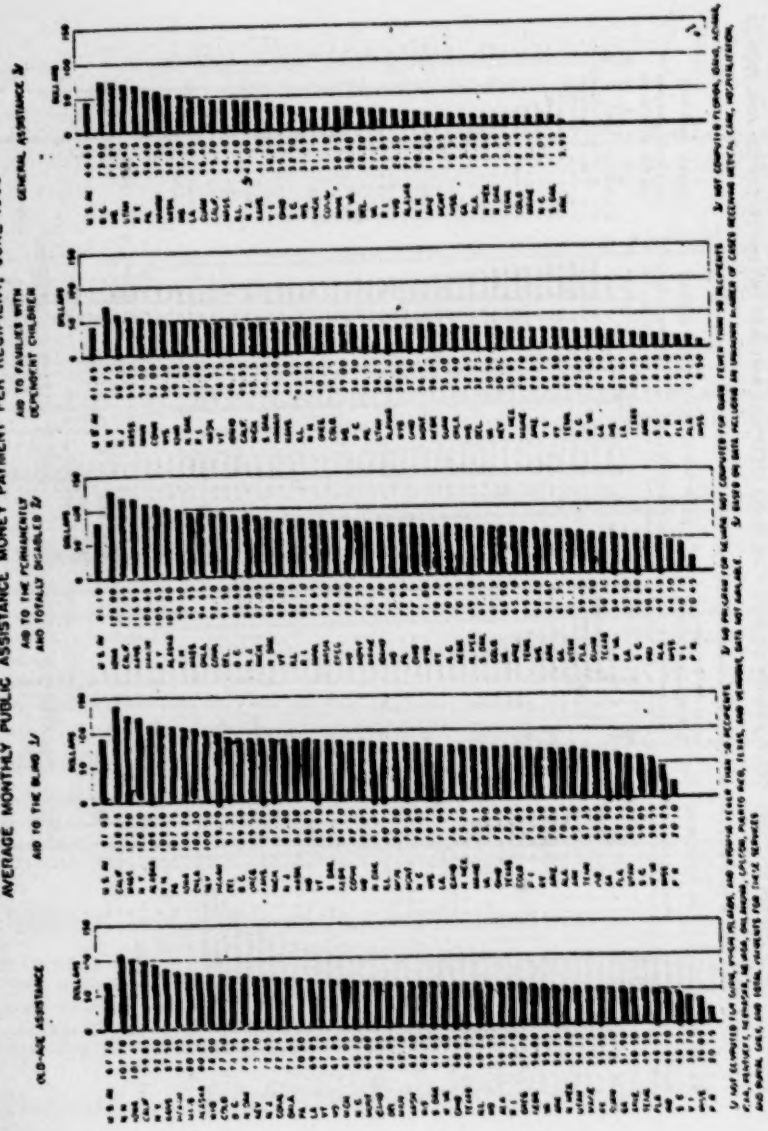

AVERAGE MONTHLY PUBLIC ASSISTANCE MONEY PAYMENT PER RECIPIENT, JUNE 1968
OLD-AGE ASSISTANCE
AID TO THE BLIND 1/
AID TO THE PERMANENTLY AND TOTALLY DISABLED 2/
AID TO FAMILIES WITH DEPENDENT CHILDREN
GENERAL ASSISTANCE 3/
DOLLARS
0
50
100
150

Exhibit J

PROPORTION OF POPULATION RECEIVING PUBLIC ASSISTANCE MONEY PAYMENTS (RECIPIENT RATES) IN THE UNITED STATES, JUNE 1968 1/

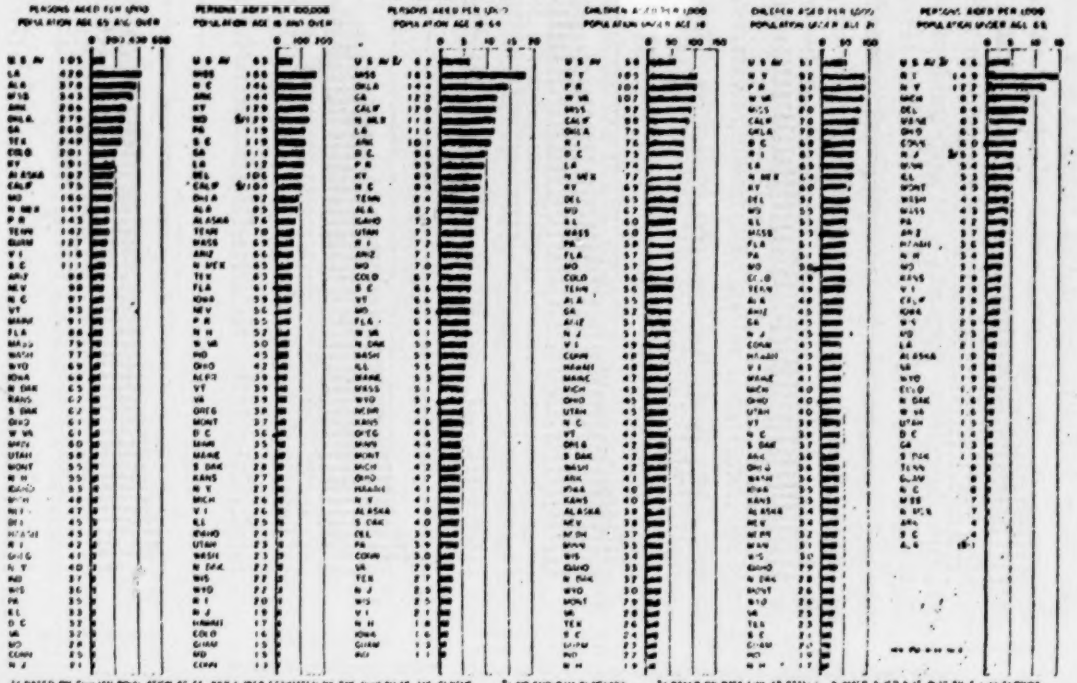
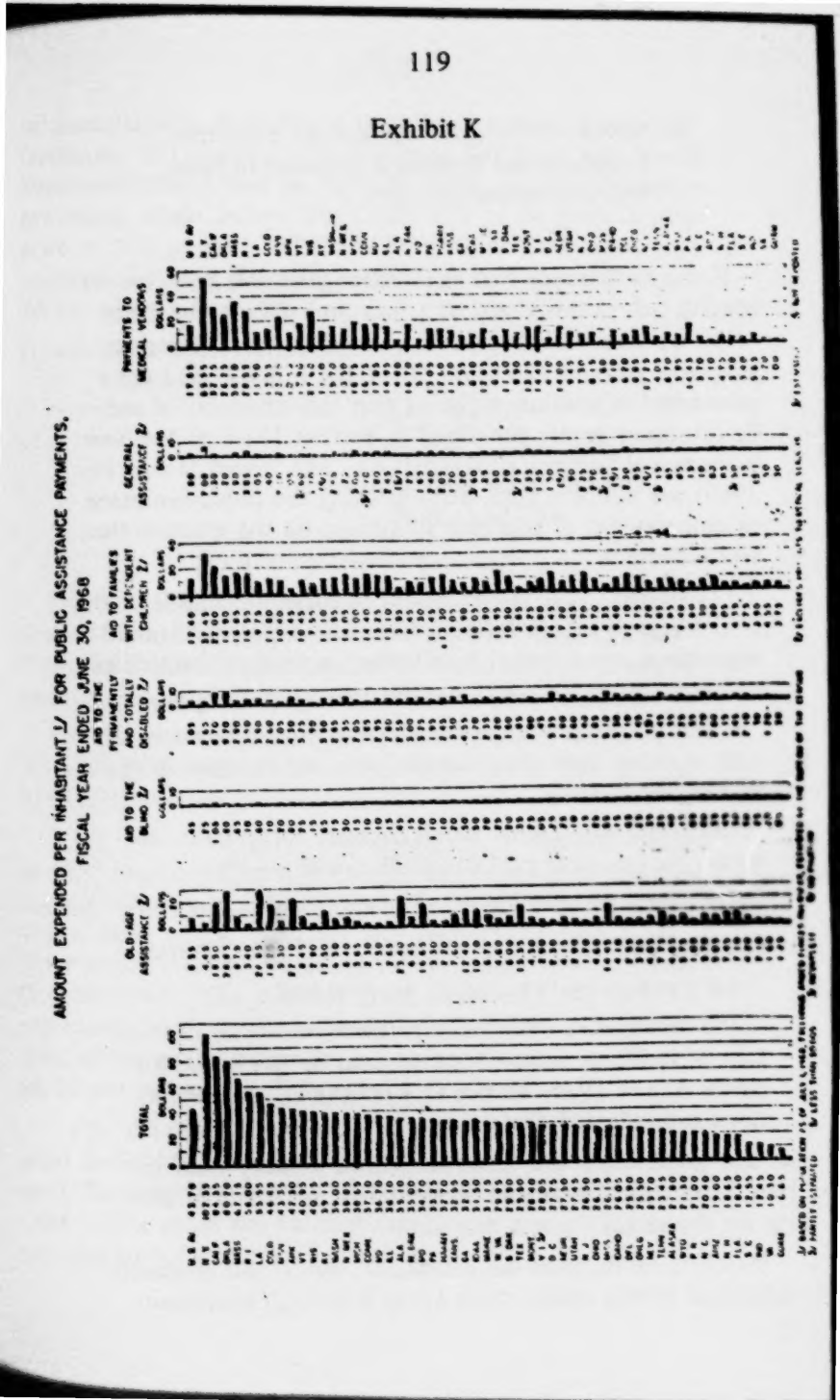


Exhibit K


AMOUNT EXPENDED PER INHABITANT 1/ FOR PUBLIC ASSISTANCE PAYMENTS,
FISCAL YEAR ENDED JUNE 30, 1968
TOTAL
OLD-AGE ASSISTANCE 2/
AID TO THE BLIND 2/
AID TO THE PERMANENTLY AND TOTALLY DISABLED 2/
AID TO FAMILIES WITH DEPENDENT CHILDREN 2/
GENERAL ASSISTANCE 2/
PAYMENTS TO MEDICAL VENDORS
DOLLARS

R. Notice of Plaintiffs' Motion for Summary Judgment and Statement Pursuant to Rule 9(g) (Document No. 29)

[Title Omitted in Printing]

Please take notice that the undersigned will bring on for hearing before this Court at a time and place to be designated by said Court, plaintiffs' motion for a summary judgment pursuant to Rule 56 of the F.R.C.P. and for a permanent injunction declaring that the schedules of public assistance grants contained in Section 131-a of the New York Social Services Law (Laws Ch. 184, added March 31, 1969) are null and void, and enjoining the implementation or enforcement of said new schedules, on the grounds that said schedules:

(1) violate the requirements of Section 402(a)(23) of the Social Security Act of 1935, 42 U.S.C. § 602(a)(23), and regulations promulgated thereunder, in that said schedules:

(a) constitute a downward rather than an upwards revision of needs standards reflecting fully changes in the cost of living since such standard was last changed prior to January 2, 1968;

(b) create maximums which decrease rather than increase the amounts paid to families, and

(c) contract the content of the standard of need.

(2) deny plaintiffs and all recipients in Nassau County

(a) the equal protection of the laws and

(b) the right to equitable treatment regardless of location of residence in the State secured by the Social Security Act of 1935, 42 U.S.C. § 602(a)(1), and regulations promulgated thereunder,

in that grant levels are lower in Nassau County than in New York City for persons whose needs and costs of living are the same.

Plaintiffs move upon the complaint, briefs, and affidavits submitted in this action, their Local Rule 9(g) statement

of material facts as to which there is no genuine issue, the testimony of Commissioners Ginsberg, Goldberg and Louchheim before this Court on April 23, 1969, and the arguments previously made before this Court and to be made in support of this motion. There is no genuine issue as to any material fact, and plaintiffs are entitled to judgment as a matter of law.

Dated: Brooklyn, New York
April 29, 1969

Lee A. Albert
Attorney for Plaintiffs
Center on Social Welfare
Policy and Law

[Title Omitted in Printing]

Plaintiffs submit pursuant to General Rule 9(g) of the United States District Court for the Eastern District of New York the following statement of material facts as to which plaintiffs contend there is no genuine issue to be tried:

1. The grant schedules in Section 131-a of the New York Social Services Law (added by Laws Ch. 184, March 31, 1969) were derived as follows:

(a) *New York City.* The mean age of the oldest child in ADC families of each given size was determined and the regular recurring grant now available for a family with the oldest child at the mean age was taken from New York State Department of Social Services Schedule SA-1, adopted October 1968. The monthly grant levels set forth in 131-a represent the grant for a family of given size with oldest child of mean size under SA-1, adopted October 1968, plus $4.25 per person.

(b) *All other counties.* The same procedure was applied to Schedule SA-3, adopted October 1968, to determine the grant for families of various sizes with an oldest child of the mean age for that family size group. The result was then "smoothed" as follows:

No. in family	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
SA-1 Grant for family with oldest child of mean age.	$102	146	185	233	255	306	355	364	413
§ 131-a grant	$101	142	183	224	257	290	323	356	389

2. The amounts paid to New York City AFDC and T-AFDC recipients in special grants for clothing and furniture, the number of recipients, and the per capita payment of such grants, according to the office records of the New York City Department of Social Services, are as follows:

	Number of People Receiving ADC-TADC	*Total Amount in Dollars Paid Out*	*Monthly Dollar Amount/Recipient*
July 67	524,868	$1,107,140	$ 2.10
Aug. 67	552,000	2,281,314	4.13
Sept. 67	557,704	4,441,867	7.96
Oct. 67	567,414	4,530,156	7.98
Nov. 67	575,537	4,493,507	7.80
Dec. 67	582,871	4,776,666	8.19
Jan. 68	597,777	3,529,499	5.90
Feb. 68	604,920	2,833,241	4.68
March 68	615,064	3,199,218	5.20
April 68	622,364	5,736,166	9.21
May 68	632,840	8,435,040	13.32
June 68	644,180	10,471,896	16.25
July 68	659,982	10,368,979	15.71
Aug. 68	673,829	9,083,154	13.48

3. The laundry schedules for New York State in effect on January 2, 1968, as set forth in 18 NYCRR § 352.5(h)(2) were as follows:

Number in household	2	3	4	5	6	7	*8 or more*
	$3.90	$5.40	$6.95	$8.45	$10.40	$11.90	$13.45

and these are the amounts which were typically supplied to recipients in New York City for laundry.

4. According to the records of the New York City Department of Social Services, the following amounts were paid to New York City AFDC recipients in January, 1968 for the special needs indicated:

Day care expenses	$ 28,153
Moving expenses	204,997
Extra school expenses	15,260
Security expenses	403,671
Accrued utilities	71,553

5. As required by the New York City Handbook for Case Units in Public Assistance Administration, Sec. II, the following monthly amounts are now provided to families with the special needs indicated in addition to the regular recurring grant:

$16.00 for an extra adult
10.00 for a blind or disabled person
5.50 for a pregnant woman
5.80 for washing babies' diapers
8.00 got people who must eat out

6. The standards of assistance in effect in New York on January 2, 1968 were established on the basis of the annual cost and price study of the New York Department of Social Services conducted in May, 1967.

7. Implementation of Section 131-a will result in a saving of funds by the State as the result of overall lower payments for public assistance grants.

8. The cost of living for welfare recipients in Nassau County is equal to or greater than that for welfare recipients in the City of New York.

Take notice that said Rule 9(g) provides that all facts hereinafter set forth "will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

Dated: Brooklyn, New York
April 29, 1969

/s/ Lee A. Albert
Attorney for Plaintiffs

Carl Rachlin
Attorney for Plaintiffs

S. Tables III, IV, V from "Welfare in Long Island" (Long Island Association of Commerce and Industry) (Document No. 36)

Table III

Percent of Public Assistance Payments From Federal Funds, by State, Fiscal Year 1967 [1]

RANK	STATE	PERCENT
1	Mississippi	81.3
2	Georgia	78.1
3	South Carolina	78.0
4	Alabama	77.1
5	Kentucky	77.0
6	Arkansas	77.0
7	Florida	76.0
8	Tennessee	75.0
9	West Virginia	75.2
10	Louisiana	74.7
11	Texas	74.1
12	Arizona	73.5
13	New Mexico	73.1
14	North Carolina	73.1
15	Idaho	70.7
16	Virginia	70.2
17	Oklahoma	70.0
18	Vermont	69.7
19	Nebraska	67.8
20	Maine	67.3
21	Utah	66.2
22	Missouri	66.4
23	North Dakota	65.2
24	South Dakota	62.5
25	Delaware	59.7
25	Indiana	59.0
27	Nevada	58.7
28	Wisconsin	58.1
29	Minnesota	54.7
2	U.S. AVERAGE	54.0
29	Iowa	53.6
31	Colorado	53.0
32	Rhode Island	52.8
33	Pennsylvania	51.8
34	Oregon	51.5
35	Wyoming	51.2
36	Kansas	51.1
37	Washington	50.9
38	Ohio	49.6
39	Maryland	49.4
40	Illinois	49.1
41	Michigan	48.9
42	California	48.6
43	Massachusetts	48.0
44	Hawaii	47.8
45	Alaska	47.7
46	Montana	46.7
47	Connecticut	45.7
48	New Hampshire	43.7
49	New Jersey	41.4
50	NEW YORK	39.9

1. Source: Same as Table I
2. Includes Guam, Puerto Rico and the Virgin Islands.

TABLE IV

Per Capita Public Assistance Payments from State and Local Funds, by State, Fiscal Year 1967[1]

RANK	STATE	PER CAPITA
1	California	$28.80
2	NEW YORK	26.00
3	Massachusetts	25.25
4	Oklahoma	22.75
5	Colorado	22.60
6	Rhode Island	19.75
7	Washington	17.40
8	Minnesota	17.25
[2]	U.S. AVERAGE	15.80
9	Connecticut	15.45
10	Michigan	14.75
11	Illinois	14.10
12	Hawaii	14.00
13	Maryland	13.95
14	Kansas	13.45
15	Pennsylvania	13.30
16	Louisiana	13.15
17	Montana	12.40
18	New Jersey	11.85
19	Ohio	11.30
20	Wisconsin	11.25
21	Oregon	11.20
22	Iowa	11.15
23	Missouri	11.00
24	North Dakota	10.40
25	Alaska	10.10
26	New Hampshire	$10.05
27	Wyoming	9.85
28	South Dakota	9.80
29	Arkansas	9.75
30	Vermont	9.15
31	Maine	8.85
32	New Mexico	8.15
33	Utah	8.05
34	Kentucky	7.60
35	Alabama	7.40
36	Delaware	7.30
36	Nebraska	7.30
36	Nevada	7.30
39	Idaho	6.90
40	West Virginia	6.60
41	Texas	6.10
42	Georgia	5.70
43	North Carolina	5.30
44	Tennessee	5.15
45	Arizona	5.00
46	Mississippi	4.50
47	Florida	4.45
48	Indiana	4.30
49	Virginia	2.85
50	South Carolina	2.55

1. Source: Same as Table I
2. Includes Guam, Puerto Rico and the Virgin Islands

TABLE V

Public Assistance Payments from State and Local Funds per $1,000 Personal Income by State 1966[1]

RANK	STATE	PAYMENT
1	California	$ 11.45
2	NEW YORK	10.35
3	Oklahoma	9.30
4	Colorado	7.85
5	Massachusetts	7.75
6	Rhode Island	6.50
7	Minnesota	5.95
8	Louisiana	5.85
9	Washington	5.50
	U.S. AVERAGE	5.40
10	Montana	4.70
10	Kansas	4.70
12	Arkansas	4.65
12	Hawaii	4.65
14	Michigan	4.60
15	Pennsylvania	4.50
16	Maryland	4.45
17	North Dakota	4.35
18	Connecticut	4.25
19	Illinois	4.05
20	Missouri	3.95
21	Oregon	3.90
22	South Dakota	3.80
22	Wisconsin	3.80
24	Ohio	3.75
25	Iowa	3.70
26	Alabama	$ [illegible]
26	New Hampshire	[illegible]
28	Vermont	[illegible]
29	Wyoming	[illegible]
30	New Jersey	[illegible]
31	Maine	[illegible]
32	Kentucky	[illegible]
32	New Mexico	[illegible]
34	Utah	[illegible]
35	Alaska	3.65
36	West Virginia	3.00
37	Idaho	2.80
38	Mississippi	2.55
39	Nebraska	2.50
40	Texas	2.45
41	Georgia	2.40
42	North Carolina	2.35
43	Tennessee	2.30
44	Nevada	2.15
45	Delaware	2.10
46	Arizona	2.05
47	Florida	1.75
48	Indiana	1.40
49	South Carolina	1.25
50	Virginia	1.05

1. Source: Same as Table I
2. Includes Guam, Puerto Rico and the Virgin Islands

T. Defendants' Supplemental Statement Pursuant to Rule 9(g) (Document No. 38)

[Title Omitted in Printing]

Defendants controvert plaintiffs' contention that there is no genuine issue as to the facts contained in paragraphs "7" and "8" of plaintiffs' statement of material facts (General Rule 9(g), U.S.D.C., E.D.N.Y.). Defendants agree that no trial is required as to these contentions.

Dated: New York, New York
May 1, 1969

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants

U. Letter from Lee A. Albert to Judges Moore, Mishler and Weinstein (Document No. 51)

May 6, 1969

Honorable Leonard P. Moore, Court Justice
Honorable Jacob Mishler, U.S.D.J.
Honorable Jack B. Weinstein, U.S.D.J.
United States Courthouse
Brooklyn, New York

Re: *Rosado v. Wyman, Civ. No. 69-355*

Dear Honorable Sirs:

This letter is submitted to clarify a misunderstanding which may result from the closing remarks on Friday of the State's attorney, in reference to the power of a federal court to enforce the plan requirements of the Social Security Act.

Federal funds utilized by the states under the ADC programs are not effected in any way by the submission to H.E.W. of a change in the plan for the administration of aid, or even by the submission of an entirely new plan.

Handbook of Public Assistance Administration, Part I, Sec. 4220. During the period of review of such changes and, indeed, the period after initial disapproval by H.E.W., the federal funds continue to flow. The plan changes submitted to H.E.W. may, and invariably are, implemented in the state during the substantial period of informal review and continuous federal funding. Federal grants for the operation of the categorical assistance programs are advanced to the states from the Treasury on a quarterly basis. 42 U.S.C. § 603(b).

The first point at which federal funds may be terminated arises only after H.E.W. has made a formal finding of nonconformity (as opposed to the more common practice of "raising questions" with the state) and conducted a formal conformity hearing. Handbook, Part I, Sec. 4310 (5). The state is then entitled to review in the United States Court of Appeals. Handbook, Part I, Sec. 4310 (3). Until that point, the state continues to utilize federal funds.

For example, the H.E.W. amicus brief in *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968) filed in the Spring of 1968, stated that New York's plan changes with respect to fair hearings and other matters had not yet been approved, and that there was substantial evidence that New York had failed to comply with the federal requirements with respect to hearings. 42 U.S.C. § 602 (a) (4). To this day, New York fails to render fair hearing decisions in accordance with the federal requirements. Welfare recipients have petitioned H.E.W. for a formal conformity hearing on this issue, and, although H.E.W. acknowledged New York's substantial non-compliance over six months ago, the federal agency continues to refuse to make a formal finding of non-compliance or to order a hearing, since the aim of H.E.W. is to achieve compliance through informal means so that federal funding to the state will not be endangered. See, letter of Robert H. Finch, attached hereto.

In *King v. Smith*, the Alabama regulation had been submitted to H.E.W. and questioned under the present 42 U.S.C. § 602 (a) (10). The regulation was continuously under question for several years during which Alabama continued to receive and expend federal monies. This case is simply *King v. Smith* several years before the continuous illegal use of federal money.

What was essential to the decision in *King v. Smith* was plan condition number 10 in 42 U.S.C. § § 402 (a) and 602 (a) – one of the conditions with which states must comply in order to receive federal money. That condition states that "aid to families with dependent children shall be furnished with reasonable promptness to all *eligible individuals*." [Emphasis added.] The Social Security Act definition of the word "parent" was relevant on the meaning of "eligible individual." It had no other legal force in the case. The only difference here is that we rely on plan condition number 23 rather than condition 10.

It may be noted that whatever H.E.W.'s view in *Lampton v. Bonin* was on the merits, it did not question the federal courts' power to interpret the federal statute and require compliance with it. H.E.W. has consistently agreed in welfare cases, that federal courts have jurisdiction to invalidate state plan provisions not conforming to the federal requirements in 402 (a). The voluntary use of federal monies compels this result under the supremacy clause of the Constitution.

Respectfully yours,

/s/ Lee A. Albert

Attachment

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON

Dear Mr. Flaster:

This is in further reply to your "Complaint and Petition," requesting a hearing to determine the conformity of New York State's public assistance programs with certain Federal requirements pertaining to fair hearings.

In the absence of a specific request by the State agency, such hearings are held only on the initiative of this Department as a last resort after questions have been raised with the State agency, and efforts have been made to resolve these questions. The calling of a hearing means that the Department has made at least a preliminary determination that deficiencies in the State's public assistance program are so serious, and attempts to obtain correction are so unpromising, that Federal payments must be withdrawn from the program. The impact of any withdrawal of Federal funds would fall predictably on the public assistance recipients in the State. For these reasons, hearings have been held only for the most irreconciliable disputes between the Federal and State agencies.

The information in your petition about fair hearing practices in New York warrants further inquiry by this Department. I have asked the Administrator, Social and Rehabilitation Service, to look into the extent of the problem and the possibilities for correction. Our aim will be to assure compliance with Federal requirements without the threat of cutoff of Federal funds.

Thank you very much for bringing this matter to my attention. Efforts such as yours are making an important contribution to the improvement of the public assistance program.

Sincerely,

/s/ Robert H. Finch
Secretary

Mr. Richard J. Flaster
Staff Attorney
Nassau County Law Services Committee, Inc.

* * *

V. Letter from Philip Weinberg to Judge Weinstein (Document No. 42)

Re: Rosado, et al. v.
Wyman, et ano.

Hon. Jack B. Weinstein
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Honorable Sir:

The bill amending Social Services Law Section 131-a(4), a copy of which was delivered to the Court yesterday, was introduced under a message of necessity from the Governor. It passed the Senate on May 1, 1969 and the Assembly on May 2, 1969. It will be presented to the Governor this Friday, May 9, 1969. Since the Counsel to the Governor assisted in the drafting of this bill, it is anticipated that there will be no objection to signature of the bill by the Governor.

In addition, pursuant to this bill, it is contemplated that regulations will be drafted by the Department of Social Services which will implement the amendment.

Respectfully yours,

Louis J. Lefkowitz
Attorney General
By

Philip Weinberg
Principal Attorney

W. Memorandum and Order of Three Judge Court Dissolving Itself (Document No. 43)

PER CURIAM

A three-judge court was properly convened in this case when plaintiffs challenged the constitutionality of section 131-a of the New York Social Services Law. Chapter 184 of the Laws of 1969, adopted March 31, 1969, effective July 1, 1969. It is contended by plaintiffs that the provision constitutes an irrational and invidious discrimination against residents of Nassau County because the schedules of payments under the Aid to Dependent Children provisions were some 15% less for Nassau County residents than for residents of the City of New York even though the cost of living for those families receiving aid to dependent children was not lower in Nassau County than in New York City.

Following designation of members of the three-judge court by the Chief Judge of this Circuit, all parties filed motions for summary judgment with supporting affidavits on April 30, 1969. On the same day that motions for summary judgment were submitted, a bill to repeal subdivision 4 of section 131-a of the New York Social Services Law and to provide a new subdivision 4 was introduced in the Legislature.

Subdivision 4 of section 131-a, as originally adopted, provided for a method of reduction of monthly grants and allowances in areas outside the City of New York but not for their increase. The new subdivision 4 provides that

the Commissioner of Social Services of the State of New York may promulgate schedules of monthly grants and allowances in individual districts "for greater or lesser amounts" than those established under section 131-a to reflect costs of living "but not to exceed the maximums prescribed" for residents of the City of New York. In addition, the new subdivision 4 also permits local social services officials, "with the approval of the appropriate local legislative body," to "make application to the department" of Social Services "for the promulgation of a schedule pursuant" to this new subdivision. The new subdivision reads as follows:

> 4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision.

This bill was adopted on May 2, 1969 by the Legislature after a message of necessity from the Governor eliminated

the need for following legislative procedures which might delay its passage. See New York State Constitution, Art. 3 § 14. The Governor signed the bill on May 9, 1969 and, according to its terms, it takes effect on July 1, 1969, as did the original subdivision 4.

Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York may—either on his own motion or after an application by a local Social Services Officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide schedules for monthly payments in all parts of the state which reflect differences in cost of living.

Under the circumstances it is apparent that the constitutional issue posed is no longer justiciable. The constitutional attack on the provision as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding. We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs. *Cf. King* v. *Smith*, 392 U.S. 309, 312, n. 3 (1968). Under the circumstances of this case there is no reason for continuing the three-judge court.

It is ordered that the three-judge court heretofore convened be and is dissolved and that the matter be and is remanded to the single judge to whom the complaint was

originally presented for such further proceedings as are appropriate. *See Peterson* v. *Clark*, 285 F. Supp. 698, 700 (N.D. Calif. 1968); *cf. International Ladies' G. W. U.* v. *Donnelly Garment Co.*, 304 U.S. 243 (1938).

So ordered.

Dated: Brooklyn, New York
May 12, 1969

/s/ LEONARD P. MOORE
Leonard P. Moore, *Judge,*
United States Court of Appeals

/s/ JACOB MISHLER
Jacob Mishler, *Judge,*
United States District Court,
Eastern District of New York

/s/ JACK B. WEINSTEIN
Jack B. Weinstein, *Judge,*
United States District Court,
Eastern District of New York

X. Temporary Restraining Order (Document No. 45) and Order Granting Preliminary Injunction by Judge Weinstein (Document No. 58)

[Title Omitted in Printing]

Plaintiffs having moved this Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a temporary restraining order restraining defendant Wyman from implementing and putting into effect the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law Section 131-a, added by Laws Ch. 184, March 31, 1969, and this motion having been considered by this Court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, the testimony taken in open court, and the hearings held to date; and upon the finding by this Court that (1) substantial questions have been raised by plaintiffs about the validity of said Section 131-a, insofar as it effectuates a reduction in the grant levels of public assistance, which require further consideration by this Court, and (2) New York, its subdivisions and recipients of public assistance throughout the State of New York will suffer irreparable injury if the preparations which are made for implementation of said reductions will prevent the continuation of grants at present levels if this Court finds the reductions invalid, it is

ORDERED, ADJUDGED AND DECREED THAT, pending adjudication by this Court of the validity of the reductions in public assistance effectuated by said Section 131-a:

1. Defendant Wyman, his successors in office, agents and employees and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Children program under State supervision (insofar as said officials have actual notice of this injunction), are hereby restrained from denying, reducing or discontinuing public assistance benefits pursuant to said Section 131-a. Benefits which

may not be denied, reduced or discontinued under this order include both regular recurring grants and special grants now available to public assistance applicants and recipients (including the quarterly "flat grant" in New York City and special needs grants throughout the State). Applications for regular and special grants shall be processed in the ordinary course of business without delay or interruption and shall be granted to all persons eligible under current standards despite any provision to the contrary in said Section 131-a.

2. The defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them including local social services officials administering the Aid to Families with Dependent Children program under State supervision (insofar as said officials have actual notice of this injunction) may take steps to prepare for conversion to the reduced grants on July 1, 1969, provided that no such step will prevent continued and uninterrupted payments under the present system or some other valid system if Section 131-a is ultimately found invalid.

It is also ORDERED, ADJUDGED AND DECREED that this Temporary Restraining Order shall expire ten days after entry unless renewed by this Court.

Dated: Brooklyn, New York
May 12, 1969

/s/ J. B. Weinstein
U.S.D.J.

Pursuant to this Court's Order and Memorandum dated May 15, 1969 and after argument by all parties, IT IS ORDERED:

(1) the above temporary restraining order is incorporated in and shall be a preliminary injunction adopted pursuant to Rule 65 of the Rules of Civil Procedure;

(2) this preliminary injunction is effective until final decision on the merits of this case;

(3) plaintiffs shall file security in the sum of $1,000 pursuant to subdivision (c) of Rule 65; and

(4) defendants' motion for a stay of this preliminary injunction is denied.

Dated: Brooklyn, New York
May 16, 1969

/s/ J. B. Weinstein
U.S.D.J.

Y. Letter from George K. Wyman to James Callison

June 2, 1969

Mr. James Callison
Regional Commissioner
Region II
Department of Health, Education and Welfare
26 Federal Plaza
New York, New York 10007

Re: Chapters 184, 186, 187, 411, 957, 1118 (A6935), 1119

Dear Mr. Callison:

I appreciate your prompt response to our request for a review of the legislation enacted in New York State this year relative to the public assistance and medical assistance program. This reply to your letter has been delayed until final action was taken on State legislation.

Maximum Monthly Grants and Allowances. As you know, subdivision 4 of Section 131-a was amended by Chapter 411 to provide for the promulgation of allowance schedules by me for use in social services districts, providing such schedules did not exceed maximum monthly grants and allowances established for the City of New York in subdivision 2 of Section 131-a.

Allowance schedules will be promulgated for the various social services districts based on the schedules resulting from

the May 1968 pricing of our quantity-quality standards as approved by you on September 23, 1968. In accordance with federal requirements for simplified budgeting, these schedules give a money amount for each household, exclusive of fuel for heating, shelter, additional allowances for clothing and furniture in certain catastrophic situations, and for occupational training expenses.

The initial point for developing the standards was the mean age of the oldest child for each size household obtained from the ADC Characteristics Study. Proper consideration was given to the fact that there is a direct relationship between the age of the oldest child and the size of the household. The monthly allowances obtained in this manner were adjusted to provide for equal increments for each additional person up to four and in a lesser amount for larger households. (See schedules attached.) The differentiation between New York City and the rest of the State is based on a recognized fact that New York City is unique by reason of its size and complexity, resulting in special requirements for transportation to use available services. Illustrative of this, but not all inclusive, is the need for transportation to various welfare centers, recreational centers for the aged, day care centers for children and cultural and recreational facilities, such as museums, parks and beaches.

Any application by a social services district for a schedule of monthly allowances, greater or lesser than these promulgated by me, will be reviewed against the cost of our statewide quantity-quality standards, based on May 1968 prices.

These monthly allowances schedules apply only to persons residing in their own home in the community. Our regulations for persons living in group-cure facilities are entirely different.

Special Provisions to Avoid Abuse of Assistance and Care. Our regulations governing the application of Chapter 184, Section 8, are attached. We have received notice of the new federal requirements which have not yet been promulgated.

Limitation on Nursing Home Care. The limitation on nursing home care which was enacted by Chapter 184 (amending subdivision 8 of Section 369-a of the Social Services Law) was revised by Chapter 957 so that there will be uniform treatment of persons receiving such care in facilities whether or not they are State operated. Absolute limitations as to the length of such care have been eliminated. Instead there is provision for a medical evaluation at the end of the first one hundred days to ascertain whether need for such care continues. If it does, such care may be provided as long as it is needed.

Determination of the Scope of Services Available Under Title XIX. There will be no substantial or meaningful reduction in the amount, duration and scope of services to the categorically needy under the State's plan in operation.

Freezing Rates of Payment for Hospital and Health Related Services. Current rates are reasonable and based on needs as required by Section 2807 of the Public Health Law of New York State. An amendment to the law made by Chapter 957 provides that current rates shall remain in effect only until December 31, 1969. At that time the need for adjustment, if any, will be considered.

Provision of Assistance in Relation to Court Orders for Support. Our regulation defining habitual failure to make support payments and describing the circumstances under which there are reasonable grounds for believing the support payments will not be made have been promulgated (copy attached) to meet your requirements that assistance payments will be made on the basis of available rather than assumed income.

Medicaid Co-Insurance Provision. This proposal has just become law. We will make appropriate provision to assure that any costs sharing by a recipient of medical assistance will not reduce such person's income below the most liberal money payment standard need by us since January 1, 1966.

As our Board Rules and Department Regulations are

promulgated, we will, of course, forward them to you promptly. We are submitting at this time two copies of all the chapter laws of 1969 above referred to.

Sincerely,

(Signed) 6/3/69

George K. Wyman
Commissioner

Z. Letter from Lee A. Albert to Judges Moore, Mishler and Weinstein enclosing letter from George K. Wyman to James Callison with enclosure (Document No. 73)

June 10, 1969

Honorable Leonard P. Moore,
Circuit Judge
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York

Honorable Jacob Mishler
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Honorable Jack B. Weinstein
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Re: *Rosa[illegible] v. Wyman, Civ. No. 69-355*
Petition for Hearing and Amended Judgment.

Honorable Sirs:

Without abandoning our claim that the mere existence of a discretionary administrative power to remedy a legislative discrimination in no way renders a challenge to that

discrimination moot or unripe, we enclose state administrative materials setting forth the actual and final exercise of the dispensing power and the schedules effective on July 1, 1969. While the amount of the differential between New York City and Nassau County has been slightly decreased by approximately 30% or less, a considerable and significant differential remains. The justification for the differential now asserted—"special requirements [in New York City] for transportation to use available services"—cannot withstand analysis. As we set out in our earlier papers, transportation costs are considerably higher in Nassau County.

Hence, we continue to believe that this differential offends the Equal Protection Clause and the uniformity requirements of the Social Security Act in exactly the same manner as it did at the outset of this lawsuit.

Respectfully submitted,

/s/ Lee A. Albert

†††

June 5, 1969

Mr. James Callison, Regional Commissioner
Department of Health, Education and
Welfare
Region II
26 Federal Plaza
New York, New York 10007

Dear Mr. Callison:

We are forwarding nine copies of our proposed Board rules and department regulations implementing this year's legislation in respect to allowances and grants.

It is our intention to release them to the social services districts that they may be prepared to authorize and issue assistance to recipients on July 1, 1969 in accordance with the decision reached in the pending court action.

We would appreciate your prompt review and the benefit of any comments you may have.

Sincerely,

George K. Wyman
Commissioner

†††

I. PURPOSE AND SCOPE

This bulletin sets forth the standards, schedules and policies to be applied uniformly in determining financial eligibility for AABD, ADC and HR, in accordance with the Social Services Law, the Rules of the State Board of Social Welfare and the Regulations of the State Department of Social Services. It includes the treatment of resources in relation to established needs of the client. It also includes the required budget worksheet (Form DSS-548) and instructions for its use. Determination of financial eligibility for Medical Assistance is set forth in Bulletin 182, and for Surplus Foods in Bulletin 154a.

II. LEGAL BASIS

A. Social Security Act

The Social Security Act authorizes federal aid for specified public assistance programs, including AABD and ADC, administered or supervised by state welfare departments in accordance with an approved "State Plan". The United States Department of Health, Education and Welfare, which administers the Social Security Act and approves each State Plan, requires that it include standards and policies to be applied uniformly throughout the state in determining eligibility and the amount of assistance. Instructions, as well as standards and policies, must be clear and definite so as to provide a basis for objective and equitable determinations in every welfare district.

B. Social Services Law

Responsibility for providing adequate assistance and care to indigent persons is specifically provided for in relation to the several distinct assistance programs - AABD (for persons over 65, blind or permanently and totally disabled), ADC and HR, in accordance with schedules of allowances and grants.

Eligibility requirements mandate application of the means test and utilization of resources in accordance with the Social Services Law, the Rules of the Board and the Regulations of the Department.

III. OFFICIAL POLICY

A. Definitions

Board Rule Section 80.1

(a) [Text omitted.]

(b) When used in these rules and in department regulations, aid to the aged, blind or disabled or AADD shall refer to the combined program for aged, blind or disabled persons established under article 5 of the Social Welfare Law, exclusive of Medical Assistance for Needy Persons or MA.

B. Standards, Generally

1. Standards of assistance

Proposed Board Rule Section 82.9

Standards for meeting needs of persons who constitute or are members of a family household.

(a) In meeting the needs of applicants for, and recipients of, public assistance, the budgetary method shall be applied by all social services districts to the individual case to determine eligibility and the amount of the grant, in accordance with the regulations of the department. Such budgetary method shall mean the balancing of available resources against the estimate of regularly recurring need by applying the standards of assistance and the policies incorporated

in these rules and in the regulations of the department governing the exploration, evaluation and application of income and resources.

(b) Standards of assistance and the policies related thereto for meeting needs shall be established in accordance with the provisions of section 131-a of the social services law, and they shall mean and include:

(1) the schedules of allowances established by the department for all items of need exclusive of shelter;

(2) the allowances for shelter established by each social services district in accordance with the regulations of the department.

(c) Such standards shall also include:

(1) appropriate provision for the additional cost of meals for public assistance recipients who live alone in accommodations without cooking facilities, in accordance with the regulations of the department approved by the director of the budget;

(2) appropriate provision for the purchase of services, in accordance with the regulations of the department;

(3) allowances for occupational training expenses in appropriate aid to dependent children and home relief cases, in accordance with the provisions of sections 159-a and 350 of the social services law and the regulations of the department;

(4) allowances for the maintenance of a child in a summer camp, in appropriate aid to dependent children cases, in accordance with the provisions of section 350 of the social services law and the regulations of the department.

C. Needs

Department Regulation Section 352.4

(a) Of persons who constitute or are members of a family household.

(1) For all items of need, exclusive of shelter, fuel for heating, additional cost of meals for persons who are unable to prepare meals at home, additional grants for replacement of clothing and furniture and allowance for occupational training, each social services district shall utilize the schedule of monthly grants and allowances applicable to it established in paragraph (2) of this subdivision.

(2) The monthly grants and allowances shall be as follows:

[See schedules SA-1, SA-2, SA-3 and SA-4 in appendix.]

(3) For the purpose of such monthly grants and allowances a child or children or adults residing with self-maintaining non-legally responsible relatives or friends, shall be considered as a holdhold separate from the self-maintaining relatives or friends.

(4) (i) Each social services district shall make an allowance for fuel for heating when it is not included in the cost of shelter in accordance with the following schedule:

[See schedule SA-6 in appendix.]

(ii) For children or adults residing with self-maintaining non-legally responsible relatives or friends, an allowance for fuel for heating shall be pro-rated.

(5) An additional allowance for fuel shall be granted when made necessary by exceptionally severe weather, overly exposed location or unusually poor construction of a dwelling, or by reasons of poor health. Circumstances requiring such additional allowance shall be fully recorded.

(6) Shelter

(i) Each social services district shall establish an allowance schedule for rent based on the number of rooms, with or without heat, utilities, furniture and furnishings. Such allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community. Such schedule

shall make provision for the payment of rent in state aided public housing and in middle income housing. The schedule established shall be filed with the department. An allowance for rent shall be made in the amount actually paid by the recipient but not in excess of the appropriate maximum of such schedule. When the tenant recipient is obligated to pay for water as a separate charge, an additional allowance shall be made for the amount required to be paid.

(ii) For children or adults residing with a self-maintaining non-legally responsible relative or friend, the allowance for rent shall be pro-rated.

(iii) An allowance for rent shall be made for a period not in excess of 60 days, when essential to retain a housing accommodation to which a recipient temporarily receiving care in a medical facility may return upon discharge from such facility.

[Note: Except for New York City, an allowance for rent for recipients who are tenants of state aided public housing shall be made in accordance with the following procedure and standard:

The social services district shall advise the local housing authority that a tenant or an applicant for an apartment is receiving public assistance and that there are a specified number of persons in the household.

Families consisting of five persons or less will be charged the base rent applicable to the particular size apartment.

Families consisting of more than five persons will be charged the base rent applicable to the particular size apartment plus four dollars per month for each person in excess of five persons.

The social services district shall advise the local housing authority whenever a welfare tenant is removed from the public assistance rolls.]

[Note: Required fees or charges shall be provided for such items as security deposit, extermination, deposit against breakage and loss, and keys. See Section D - Purchase of Services.]

(iv) Shelter costs for client-owned property

(a) Carrying charges

On client-owned property used as a home, carrying charges shall be met in the amount actually paid by the recipient but not in excess of the appropriate maximum of the rent schedule for the items of taxes, interest on mortgage, fire insurance, water rates and assessments.

[See Department Regulation Section 352.7(c)(4).]

(b) Amortization

The amount required to amortize a mortgage on the recipient's property shall be included in the carrying charges when property is income-producing and the resulting carrying charges do not exceed the property income by an amount in excess of the maximum of the established rent schedule or when property is not income producing but it is essential to retain the home of the recipient and the carrying charges do not exceed the appropriate maximum of the established rent schedule.

[Note: When practicable, social services officials may exercise the rights prescribed in Section 106 of the Social Services Law concerning deeds or mortgages to be taken.]

(c) Property repairs

The cost of property repairs shall be met when:

(1) the property is income-producing and the repairs are essential to retain that status; or

(2) the repairs are essential to the health, safety or comfort of the recipient.

(d) Shelter costs for property deeded to social services official

Property on which a social services official has taken a deed under the provisions of Section 106 of the Social Services Law may be used to shelter a public assistance recipient, whether it be the former owner or other recipient. Allowances for fixed charges or repairs on such property constitute the cost of shelter of the recipient. For a multiple dwelling only that part of the total maintenance cost applicable to the space occupied by the recipient shall be used in computing the shelter allowance.

Allowances in lieu of rent
Board Rule Section 80.12

(a) When allowance is required

In cases of temporary need a social services official shall include in the grants he makes to a recipient of AABD, HR or ADC who owns real property which he uses as his home, allowances in lieu of rent to enable such recipient to make payments required to be made on such property for mortgage installments, real estate taxes, fire insurance premiums, water charges, sewer rents and assessments, but such allowances shall not exceed the amount that such official would allow under his agency's rent schedule if the recipient were required to pay rent.

(b) When allowance is discretionary

In other cases a social services official may, in his discretion, include in the grants he makes to a recipient of AABD, HR or ADC who owns real property which he used as his home, allowances in lieu of rent to enable such recipient to make payments required to be made on such property for mortgage installments, real estate taxes, fire insurance premiums, water charges, sewer rents and assessments, but such allowances shall not exceed the amount that such official would allow under his agency's rent schedule if the recipient were required to pay rent.

(c) Application of income

However, any allowances made pursuant to this section shall be limited to the amount of any balance remaining to be paid on the charges enumerated above after income derived from the property has been applied towards the payment of such charges.

(d) Suitability of home

An allowance shall not be made under this section if the home is a hazard to the health or safety of the occupants or is not suitable for their needs.

Department Regulation Section 352.4 (continued)

(v) If an applicant's furniture which is essential to making his living accommodations habitable is encumbered by a chattel mortgage or was purchased under a conditional sales contract, every effort shall be made to defer, cancel or reduce payments on such chattel mortgage or conditional sales contract. If all such efforts fail, an allowance may be made for a compromise settlement of such payments or, if a compromise cannot be reached, for other essential payments.

(7) Provision for the additional cost of meals for persons unable to prepare meals at home shall be allowed in accordance with the following schedules:

[See schedule SA-5 in appendix.]

(8) Grants for clothing and furniture in case of catastrophe

(i) Each social services district shall make grants for partial or total replacement of clothing or furniture which has been lost in a fire, flood or other like catastrophe.

(ii) Those grants for one or more items of clothing or furniture shall be based upon the current local price of such item, but shall not exceed the maximum allowances as follows:

[See schedule SA-7 in appendix.]

(9) Occupational training allowances for ADC and HR recipients

Allowance shall be made for the costs of tuition, books, supplies and other essential items required to enable an unemployed parent or minor between 16 and 21 years of age receiving ADC and any person receiving HR to obtain suitable occupational training from a trade school or other institution licensed or approved by the State Education Department, provided such person could not otherwise obtain such training without cost and demonstrates to the satisfaction of the social services official that he or she possesses the talent, aptitude and ability necessary to benefit from the proposed course of training.

(10) Payment for services and supplies already received

Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need.

(i) If a check for a grant is reported lost or stolen, an affidavit of loss shall be required of the recipient and payment of the check shall be stopped. Such check shall be replaced. If payment cannot be stopped the agency shall claim state reimbursement on only one of the two checks.

(ii) An allowance to meet the cost of rent shall be made for the entire month in which the case is accepted if essential to retain the living accommodation. A grant to meet the cost of such items as taxes and interest on mortgages may be made for the billing period immediately preceding acceptance, if such payment is essential to the health and safety of the recipient.

(iii) A grant to pay for utilities already furnished to prevent a shut-off up to but not exceeding a four-month period immediately preceding the date of application for utilities for an applicant for assistance in the same dwelling for which he is applying for utilities.

[Note: Section 12 of the Transportation Corporations Law provides that gas or gas and electric corporations must provide service to recipients of assistance even though the recipient owes arrearages to the corporation for service provided in a prior dwelling place.]

(iv) A grant may be made to pay for rent, taxes or mortgage for a period prior to the month in which case was opened or prior to the month in which a current bill was due when the case was opened under the following specified conditions:

(a) such payment is essential to forestall an eviction and no other facilities are available; and

(b) the health and safety of the applicant or recipient is severely threatened by failure to make such payments and

(c) the authorization for payment of such a back bill receives special written approval by the social services official or such other administrative officer as he may designate, provided such person is higher in authority than the supervisor who regularly approves authorization.

[Note: Department Regulation Section 351.27 provides:

Correction of error by a social services official

(a) A social services official may make a grant to correct an error which denied an application for assistance, discontinued a recipient from assistance or otherwise deprived a recipient of the full amount to which he was entitled, for a period not in excess of two months preceding the month in which the correction is made.

(b) A social services official may make a grant to correct an error after a request for a fair hearing but prior to the hearing itself or the hearing decision, retroactive to the date the incorrect action was taken.]

[Note: Department Regulation Section 358.8 provides:

Correction of error pursuant to a fair hearing decision

When a fair hearing decision has ordered the correction of a discontinuance, the correction of a denial of an application for assistance, or the correction of the amount of assistance, a grant shall be made to cover the full amount to which the applicant or recipient was entitled in accordance with the decision for the entire period from the date the incorrect action was taken.]

(b) Of persons whose living arrangements are board and room: care in a home for adults. convalescent home and home for the aged

(1) For persons unable to be cared for in their own homes, board and room, care in a home for adults, convalescent home, home for the aged or other suitable facility shall be provided by the social services district. Each social services district shall establish rates for board, for board and room, and for care in a home for adults, a convalescent home, and a home for the aged, as follows:

(i) For board and room: An amount to cover the cost of board, the laundering of linens, additional utilities and household supplies, plus room rent and plus a reasonable profit except where furnished to a relative.

(ii) For care in a private proprietary home for adults or convalescent home: The lowest rate for which suitable care can be purchased from such facilities.

(iii) For care in a non-profit home for adults, convalescent home, or home for the aged: The per diem cost of such care with due consideration to the services provided and the tax exempt status of the home.

(2) Adult recipients living in a boarding home, home for adults or home for the aged and recipients receiving care in infirmaries, nursing homes or similar medical facilities shall be granted an allowance of $15 per month for personal expenses, including clothing and incidentals.

[See bulletin 182, Board Rule Section 85.4(b) (2) (i) and Department Regulation Section 360.18.]

For patients incapable of handling cash, clothing and incidentals not provided by the facilities shall be provided in kind.

(3) An allowance of the rate for shelter in a congregate facility shall be made for a period not in excess of thirty days when essential to retain place to which a recipient temporarily receiving care in a medical facility may return upon discharge from such facility.

(4) An allowance to meet the cost of board and room or care in a home for adults, convalescent home, or a home for the aged shall be made for the entire month in which the case is accepted if essential to retain the use of the facility. An allowance may be made to pay for the cost of such care for a period prior to the month in which the case was opened, but not prior to the date of application under the following specified conditions:

(i) such payment is essential to retain the care in the facility and no other facilities are available; and

(ii) the authorization for payment of such back bill receives written approval by the social services official or such other administrative officer as he may designate, provided such person is higher in authority than the supervisor who regularly approves authorization.

(c) Duplication of allowances and grants

Supplemental allowances and grants may not be made in excess of established schedules. If special allowances and grants are made which duplicate any grant and allowance already made, because the cash has been lost or stolen, such duplicate allowances and grants are not reimbursable by the state.

D. Purchase of Services

Department Regulation Section 352.5

Each of the following services shall be purchased by the social services districts for the recipient in the amount necessary, whenever the special circumstances noted below are found to exist. The special circumstances and the considerations entering into the agency decision to provide such service shall be recorded. For each service purchased for which the department has not established the fee to be paid, each social services district shall establish the amount to be paid. For those services for which establishment of a flat fee or a range of fees is not practicable, the amount shall be filed with the department in accordance with Section 300.2 of the Regulations. [See Bulletin 153.]

(a) Day care in a day care center, in a family home or approved "in home day care" shall be purchased when the homemaker is employed, is receiving occupational training, is physically or mentally incapacitated, or when family duties away from home necessitate her temporary absence. If "in home day care" is purchased by the social services district in the recipient's own home, provision shall be made for Workmen's Compensation and other benefits as required by or pursuant to law.

(b) Homemaker service essential to meet social needs shall be purchased from an approved social agency when such service is not available through staff of the social services district.

(c) Housekeeping services for a recipient who is unable to perform housekeeping tasks shall be provided. When it is not provided by staff of the social services district it may be purchased from another agency or from an individual. When such service is purchased from an individual by the social services district provision shall be made for Workmen's Compensation and other benefits as required by law.

(d) [Illegible] when funds cannot be obtained from other sources, shall be paid for children receiving ADC not

in excess of total cost of $96 per child for one-half of one percent of the total number of children receiving ADC in the social services district.

(e) Household moving expenses shall be paid when a change of residence is necessary and other means are not available for payment of such expenses.

(f) Security deposits, deposits against breakage or loss, extermination fees, finder fees or other charges related to securing or retaining shelter shall be provided.

(g) Life insurance premiums shall be met when the policy is assigned to the agency or when the recipient is aged, his life expectancy is short, or he is deemed uninsurable.

[Note: Consideration shall be given to adjustment and to disability provisions.]

[Note: For health insurance premiums, see Bulletin 182 and Department Regulation 360.16(c).]

G. Budgeting

1. The budgetary method
Department Regulation Section 353.1

(a) The budgetary method shall be applied to the individual case to determine eligibility and the amount of the grant and/or the fee to be paid for a purchase of service.

(b) When the estimate of regularly recurring need exceeds the available resources, the difference shall be known as a budget deficit. When the available resources exceed the estimate of regularly recurring need, the difference shall be known as a budget surplus.

(c) An individual or family shall be deemed in need when a budget deficit exists or when the budget surplus is inadequate to pay for a service required by the case circumstances.

(d) Where investigation has been completed and need established on a continuing basis the regularly recurring cash grant shall meet the full budget deficit if there is one

and/or provision shall be made for the purchase of service when need is based on the need for such service.

(e) When an item, such as utilities, is paid by voucher or restricted grant, the amount paid shall be deducted from the ensuing regularly recurring cash grant, or grants when the amount is large.

[Note: Section 15 of the Transportation Corporations Law provides that it shall be unlawful for any gas or electric corporation to discontinue the supply of gas or electricity to any person or persons receiving public assistance, for non-payment of bills rendered for service, if the payment for such service is to be paid directly by the department of social welfare or the public welfare official in such locality.]

(f) When the budget deficit increases between periods covered by the last regularly recurring grant, a special grant shall be made for the difference. This shall include the allowance necessary to provide for an additional member of the household on a pro-rated basis for a member of the public assistance household who returns home for a visit.

2. Persons included in the budget
Department Regulation Section 353.2

(a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance and care and living as a unit within the same household. This shall mean members of the family temporarily absent from the home such as children or minors attending school away from home, other than schools where maintenance is provided without cost.

The household of a pregnant woman shall be considered as increased by one person from the fourth month of the pregnancy which has been medically verified.

(b) A non-legally responsible relative in the household who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. A lodger or boarding lodger shall

not be included in the budget. The amount of room and board which he pays shall be verified and that which is in excess of $55 a month shall be considered as income to the family. The amount paid by a lodger shall be verified and that which is in excess of $12 a month shall be considered as income to the family.

[Note: Rent, as paid, is budgeted for the assistance group, even though in excess of shelter schedule allowance, when lodging is furnished as in (a) or (b) above. Income received will, in effect, reduce shelter costs for assistance group by application of net income.]

3. Estimate of need and application of income
Department Regulation Section 353.3

(a) For applicant or recipient

(1) The estimate of need for any applicant or recipient shall include all items of basic maintenance and items of regularly recurring special need specified in Section 352.5 of these regulations for persons in the circumstances under which such items are allowed. The amount to be included for each item of basic maintenance and for each item of special need shall be the appropriate amount provided in the allowance schedule for such item. However, the schedule allowance for items of basic maintenance or special need may, if insufficient, be adjusted when the individual circumstances are such as to require some modification of the scheduled amount and these circumstances have been verified and recorded. To the extent that an item of basic maintenance or special need is otherwise provided it shall not be included in the estimate of need, but the manner in which such item is provided shall be recorded.

(2) (i) All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, including support payments required to be made by a parent pursuant to an order of the family court or other appropriate court, shall be pro-rated and applied against the needs of the applicant, the spouse and the minor children

of either or both. If the spouse is possessed of income but, under exceptional circumstances, refused to make application for assistance and to have his income so applied against the needs of his family, the needs of such person shall be estimated as if he were applying for public assistance and his income applied first against his own needs and any surplus against the needs of his dependents. These policies shall ordinarily be applied even though there is no legal marriage if the adults are generally regarded as man and wife.

(ii) If there has been habitual failure to make court ordered support payments or where the circumstances are such that there are reasonable grounds to believe that such support payments will not be made, the income therefrom may be considered as irregular as to amount or uncertain as to receipt and the provisions of subdivision (d) of this section shall be considered as applicable.

(iii) Failure to make at least three payments in full during the preceding three month period shall be deemed to constitute a habitual failure to make payments.

(iv) The following shall constitute reasonable grounds to believe that court ordered support payments will not be made by the parent who has been ordered to make such payments:

(a) the parent has failed to make at least three consecutive court ordered support payments in full; or

(b) the whereabouts of the parent are unknown; or

(c) the parent is known to be unemployed; or

(d) the parent is confined to a medical institution or is obviously too ill or incapacitated to work; or

(e) the parent is incarcerated in a penal institution.

(v) In cases in which the parent is making payments on a regularly recurring basis, but in an amount less

than the amount stated in the court order, such lesser amount only shall be applied against the needs of the applicants or recipients in determining the amount of the grant.

[Note: There may be other circumstances which a social services official believes constitute "reasonable grounds" which have not been recognized. If so, these should be submitted to the department for consideration of an amendment to the regulation. The social services official is still responsible for continuing cooperation with the courts in order to enforce court ordered payments as provided in Department Regulation Section 351.2 pages 7-9 of Bulletin 91b.]

SCHEDULE SA-1

MONTHLY GRANTS AND ALLOWANCES

New York City

Number of Persons

One	Two	Three	Four	Five	Six	Seven	Each Additional Person
$70	116	162	208	254	297	340	$43

SCHEDULE SA-2

MONTHLY GRANTS AND ALLOWANCES

Counties of: Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester.

Number of Persons

One	Two	Three	Four	Five	Six	Seven	Each Additional Person
$65	107	149	191	233	270	307	$37

SCHEDULE SA-3

MONTHLY GRANTS AND ALLOWANCES

Counties of: Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Oneida, Onondaga, Ontario, Orange, Orleans, Oswego, Otsego, Putnam, Rensselaer, Rockland, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuylor, Seneca, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates.

Number of Persons

One	Two	Three	Four	Five	Six	Seven	Each Additional Person
$62	104	146	188	230	267	304	$37

SCHEDULE SA-4

MONTHLY GRANTS AND ALLOWANCES

Counties of: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming.

Number of Persons

One	Two	Three	Four	Five	Six	Seven	Each Additional Person
$59	101	143	185	227	264	301	$37

SCHEDULE SA-5

RESTAURANT ALLOWANCE SCHEDULE

Monthly allowances to be added to appropriate monthly grants and allowances for combinations of restaurant meals and meals prepared at home, including sales taxes.

Dinner in a restaurant	$26
Lunch and dinner in a restaurant	43
All meals in a restaurant	58

SCHEDULE SA-5a

RESTAURANT ALLOWANCES FOR AN EMPLOYED ADULT

Breakfast	$ .75
Lunch	.90
Dinner	1.30

SCHEDULE SA-6

MONTHLY ALLOWANCES FOR FUEL FOR HEATING

New York City & Counties of: Dutchess, Monroe, Nassau, Suffolk, Ulster, Westchester.

	1 & 2 Persons	*3 & 4 Persons*	*5 & 6 Persons*	*7 & 8 Persons*	*9 & 10 Persons*
Year Round Basis	$14.80	15.00	16.60	18.20	19.70
Eight Months Heating Season	20.50	21.00	23.35	25.75	28.40

Counties of: Allegany, Chautauqua, Erie, Genesee, Niagara, Steuben.

Year Round Basis	$12.60	14.00	15.40	18.20	21.00
Eight Months Heating Season	19.00	21.10	23.10	27.40	31.60

City of Jamestown:

Year Round Basis	$ 9.20	9.70	11.00	12.20	13.30
Eight Months Heating Season	12.40	13.30	15.00	16.80	18.60

Counties of: Albany, Broome, Cayuga, Chemung, Chenango, Columbia, Cortland, Greene, Livingston, Onondaga, Ontario, Orange, Orleans, Putnam, Rensselaer, Rockland, Schoharie, Tioga, Wayne and Yates.

Year Round Basis	$15.50	17.10	20.20	23.40	26.60
Eight Months Heating Season	22.60	25.00	29.70	34.40	39.20

Counties of: Cattaraugus, Delaware, Fulton, Madison, Montgomery, Oneida, Otsego, Saratoga, Schenectady, Schuylor, Seneca, Sullivan, Tompkins, Warren, Washington and Wyoming.

Year Round Basis	$17.00	18.80	22.30	25.80	29.20
Eight Months Heating Season	24.80	27.40	32.60	37.80	48.00

Counties of: Clinton, Essex, Franklin, Hamilton, Herkimer, Jefferson, Lewis, Oswego and St. Lawrence.

	1 & 2 Persons	*3 & 4 Persons*	*5 & 6 Persons*	*7 & 8 Persons*	*9 & 10 Persons*
Year Round Basis	$18.60	20.50	24.30	28.10	31.80
Eight Months Heating Season	27.10	30.00	35.60	41.30	47.00

SCHEDULE SA-7

MAXIMUM REPLACEMENT COST OF CLOTHING

	Column I	*Column II*
	Spring and Summer	*Fall and Winter*
Birth to one year	$43.00	$ 38.00
1 through 5 years	34.00	49.00
6 through 11 years - Girls	60.00	75.00
Boys	54.00	78.00
12 through 18 years - Girls	82.00	100.00
Boys	62.00	83.00
Women	79.00	100.00
Men	60.00	83.00

MAXIMUM REPLACEMENT COST OF ESSENTIAL HOUSEHOLD FURNITURE, FURNISHINGS, EQUIPMENT AND SUPPLIES

	Number of Persons					
	One	Two	Three	Four	Five	Six
	$374	404	519	557	693	740
If not furnished by landlord, add:						
Cabinet for linens	20	20	20	20	20	20
Gas range for cooking	165	165	165	165	165	165
Refrigerator	165	165	165	220	220	220
Gas stove for heating	65	65	65	65	75	75

AA. Revised Memorandum of Judge Weinstein Granting Preliminary Injunction and Summary Judgment (Original Document Nos. 57, 78)

[Title omitted in printing]

[PRELIMINARY INJUNCTION]

May 15, 1969

WEINSTEIN, D.J.

[5] Plaintiffs bring this class action to challenge the validity of section 131-a of the New York Social Services Law, effective July 1st of this year (ch. 184, L. 1969). They allege that it is void because it does not meet the standards laid down by section 402(a) (23) of the Social Security Act of 1935, as amended in 1968, for participation by a state in the federally-funded Aid to Families with Dependent Children program (AFDC). *See* 42 U.S.C. § § 601, 602; 45 C.F.R. § 233.20(a) (2) (i), 34 Fed. Reg. 1394 (1969). Section 402(a) (23), they contend, requires a state, if it is to participate in AFDC, to take into account increases in the cost of living in computing new benefit levels. Their claim is that New York State, while it continues to participate, has reduced scheduled AFDC payments.

Both plaintiffs and defendants have moved for summary judgment. In addition, plaintiffs have moved for a preliminary injunction to enjoin the defendants from instituting changes pursuant to section 131-a until this litigation can be decided on the merits.

The test for granting summary judgment is whether there exists "any 'genuine issue as to any material fact', [6] F.R. Civ. P. 56(c); see, F.R. Civ. P. 56(e)." *Waldron v. Cities Service Co.*, 361 F.2d 671, 672 (2d Cir. 1966), *aff'd sub nom. First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). The test for granting a preliminary injunction is whether plaintiffs have made "a clear showing of probable success and probable irreparable injury." *Clairol Incorporated v. Gillette Company*, 389 F.2d 264, 265 (2d Cir. 1968). See F.R. Civ. P. 65.

For the reasons stated below, it is clear that plaintiffs have a substantial claim with a high likelihood of prevailing on the merits and that they will probably suffer irreparable damage unless a preliminary injunction is granted. Accordingly, such an injunction will issue.

There are still a number of unresolved questions of fact. The statistical and other data underlying this dispute have not yet been developed with clarity sufficient to warrant the granting of summary judgment. Pursuant to Rule 56 (f) of the Federal Rules of Civil Procedure, this Court orders "a continuance to permit affidavits to be obtained or depositions to be had" or testimony and exhibits to be presented.

[7] Because of the importance of this matter we assume that defendants will wish to take an immediate interlocutory appeal pursuant to section 1292(a) (1) of title 28 of the United States Code from the order granting the preliminary injunction. In order to render as much assistance as possible to the Court of Appeals and to the parties we have set out below the posture of the case in more detail than is ordinarily warranted in disposing of preliminary applications. It should be emphasized that the conclusions are made only for the purpose of deciding the motions before us and are not determinative of the merits of the case.

[8] I. *JURISDICTION*

In *King v. Smith*, 392 U.S. 309 (1968), the Supreme Court left open the question "whether and under what circumstance suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." 392 U.S. at 312, n. 3. Since plaintiffs' equal protection claim is no longer before this Court (*Rosado v. Wyman*, ___ F. Supp. ___ (E.D.N.Y. 1969) *per curiam* opinion of three-judge court), we must confront the question of our jurisdiction to decide the federal statutory claim. We conclude that there are a number of independent bases of jurisdiction.

A. *Pendent Jurisdiction*

Once its jurisdiction has been properly invoked, a federal district court acquires pendent jurisdiction to decide all related claims arising out of the same transaction or dispute. *See, e.g., United Mine Workers v. Gibbs,* 383 U.S. 715 (1966); *Hurn v. Oursler,* 289 U.S. 238 (1933); *Gulickson v. Forest,* 290 F. Supp. 457, 464 (E.D.N.Y. 1968). The district court has power to decide the pendent claim even if it does not reach the issue which provided the basis for the court's jurisdiction or even if it first decides the jurisdiction founding issue against the plaintiffs. [9] *See, e.g., King v. Smith,* 392 U.S. 309 (1968); *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966); *Siler v. Louisville & Nashville R. Co.,* 213 U.S. 175 (1909); *Gulickson v. Forest,* 290 F. Supp. 457, 464 (E.D.N.Y. 1968).

In the present case, it is clear that at the time the three-judge court was convened jurisdiction existed pursuant to section 1343(3) of title 28 and sections 1983 and 1988 of the United States Code. These provisions grant original jurisdiction to the federal district courts, without respect to the amount in controversy, over cases where it is claimed that a right under the United States Constitution is being violated. The three-judge court, in its *per curiam* opinion, noted that it had been "properly convened" (*Rosado v. Wyman,* __ F. Supp. __, __ (E.D.N.Y. 1969)), thereby impliedly ruling that a substantial federal queston had been raised. *See, e.g., Swift & Co. v. Wickham,* 382 U.S. 111, 115 (1965) ("no such court [three-judge court] is called for when the alleged constitutional claim is insubstantial"); *Kramer v. Union Free School Dist. No. 15,* 379 F. 2d 491 (2d Cir. 1967). There is no doubt that under the liberal test recently enunciated by the Supreme Court in *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), the cause of action based on the Social Security Act would be considered pendent to the equal protection claim.

[10] The question posed is whether this Court has been divested of pendent jurisdiction because the federal constitutional claim was rendered moot after the three-judge

court convened and heard argument on motions by all parties for summary judgment. For the reasons stated below, we hold that under the circumstances of the instant case, this question must be answered in the negative.

Federal courts, in the exercise of discretion, have tended to voluntarily abstain from deciding pendent questions where the claim which provided the basis for its jurisdiction has been disposed of prior to trial. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well"); *Wham-O Mfg. Co. v. Paradise Mfg. Co.*, 327 F.2d 748, 752-54 (9th Cir. 1964); *Strachman v. Palmer*, 177 F.2d 427, 431 (1st Cir. 1949) (concurring opinion); Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018, 1025 (1967); *cf. Clairol Incorporated v. Gillette Company*, 389 F.2d 264, 267-268 (2d Cir. 1968) (jurisdiction over unfair competition claim despite concession of lack of valid trademark registration); *Rogers v. Valentine*, 37 F.R.D. 231 [11] (S.D.N.Y. 1964) (after summary judgment granted on federal claim, jurisdiction retained over pendent non-federal claim).

The rationale for this doctrine of restraint in the exercise of pendent jurisdiction is that a federal court should seek to avoid "[n]eedless decisions of state law";

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. *United Mine Workers v. Gibbs*, 363 U.S. 715, 726 (1966).

See also Wham-O-Mfg. Co. v. Paradise Mfg. Co., 327 F.2d 748, 753 (9th Cir. 1964); *Strachman v. Palmer*, 177 F.2d 427, 431, 433 (1st Cir. 1949) (concurring opinion). Accordingly, applying what has been referred to as "the introduction of evidence test," some federal courts have held that "when a federal claim is dismissed *on the pleadings*, the court should not retain a related nonfederal claim ab-

sent an independent basis for federal jurisdiction." Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018, 1025 (1962) (emphasis in original).

Application of this rule would be entirely inappropriate, wasteful of judicial energy and extremely prejudicial to the litigants in a case such as the one before us. The pendent [12] claim does not involve state law alone, but poses crucial and important questions of federal statutory law. It vitally affects a national program designed to protect the fundamental rights of children to the sustenance and stable family life which will enable them to develop into full members of our society capable of exercising their rights and responsibilities under the United States Constitution and it involves the expenditure of billions of dollars of federal monies. The courts in the federal system are in at least as good a position as state courts to adjudicate this question of federal law. Nor can this be described as a petty or unimportant controversy of the kind Congress sought to exclude from the federal courts.

We do not mean to suggest that the New York State courts would be more likely to fall into error or to show hostility toward federal law than would a federal court. We are only deciding now whether it is appropriate for a federal court to divest itself of jurisdiction of a pending case.

Factors to be taken into account in deciding this question include "judicial economy, convenience, and fairness to litigants." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). These criteria provide justification for the doctrine of pendent jurisdiction generally; they compel retention of jurisdiction in the instant case.

[13] A speedy determination of this litigation is highly desirable. From the point of view of the plaintiffs, an unnecessary reduction of their benefits may reduce their income below subsistence level, causing grievous harm. From the state's vantage point, an unnecessary extension of any temporary restraining order preventing institution of the new reduced benefits would, according to the tes-

timony of a Deputy Commissioner in the State Department of Social Services, result in a loss to the state of up to ten million dollars a month. Dismissal, under the abstention doctrine, would require plaintiffs to commence a new suit in the state courts. The resulting loss of time would make it impossible to decide the issues before administrative arrangements must be made to implement the new state statute by its effective date–July 1, 1969.

Furthermore, the parties have already presented substantial testimony, affidavits and briefs to the Court. The expenditure of time by the litigants and the Court would be, to a large extent, wasted were all these materials to be offered anew in a state court.

Having found that pendent jurisdiction exists, we need not reach the question whether administrative remedies must be exhausted in a suit challenging a state AFDC provision [14] solely on statutory grounds. *See King v. Smith*, 392 U.S. 309, 312, n.4 (1968); *Rosado v. Wyman*, ___ F. Supp. ___ (E.D.N.Y. 1969) (HEW not necessary party); *cf.* Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 91-92 (1967) (inadequacy of federal administrative forum).

B. *Federal Question Jurisdiction*

Section 1331 of title 28 of the United States Code also supports jurisdiction. This provision grants the district courts jurisdiction over all civil actions arising under "the Constitution, laws, or treaties of the United States" provided that "the matter in controversy exceeds the sum or value of $10,000."

There is no doubt that the first requirement is met since plaintiffs allege that the challenged state statute violates section 402(a) (23) of the Social Security Act. Defendants contend, however, that the controversy does not involve more than $10,000.

In determining whether this prerequisite has been satisfied in a class action of this kind, the claims of the individual plaintiffs or individual members of the class may not

be aggregated. *Snyder v. Harris*, ___ U.S. ___, 37 U.S.L.W. 4262 (1969). *Compare* 1 Moore, Federal Practice Par. 0.91[1] at p. 827 (2d ed. 1964) *with* Wright, Federal Courts 100 (1963). Nevertheless, for purposes of jurisdiction in this case, [15] each family may be considered as a unit and the claims of each member of a single AFDC family can be combined because the federal statutory program involved is designed to protect the family as a unit.

If we only look to the impending reductions in welfare payments that any family in the class may suffer, the monetary loss to each of the plaintiffs does not approach $10,000. Yearly welfare payments may not be multiplied by a number of years in the future to make up the $10,000 requirement because it is too speculative to assume that any particular plaintiff will remain on welfare for such a period or that the program will remain unchanged.

While the direct damage to each member of the class does not suffice, the indirect damage to each plaintiff and her charges may be very high. The test for determining the amount in controversy relies heavily upon plaintiffs' good faith and the certification of lawyers pursuant to Rule 11 of the Federal Rules of Civil Procedure that there is "ground to support" the pleadings. It has been described by the Supreme Court as follows:

> The rule governing dismissal for want of jurisdiction in cases brought in federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

[16] *See also Horten v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 353 (1960); Wright, Federal Courts 94-95 (1963).

There is before this Court uncontradicted evidence, by testimony and affidavits, that members of the class are at or below a bare subsistence level. Under such circumstances,

a reduction in welfare benefits putting their income substantially below that threshold may threaten injuries to their children's physical and mental development far greater than the mere monetary loss in benefits. *Cf. Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (psychological damage resulting from improper schooling). Deprivations during early years may irreversibly retard mental and physical development and have an adverse impact on personality.

Without intimating that the position of these plaintiffs is at all comparable, the possibility of a serious injury resulting from a comparatively minor deprivation may be more clearly seen if we look at the situation of a Biafran child. A few cents a day is enough to prevent starvation or permanent maiming of such a child; several dollars a year might mean the difference between a healthy life and a stunted life or death. Certainly, to such a child, the question whether $10 in foodstuffs should be granted or withheld over a period of a year involves the monetary value of a human life.

[17] We need not go outside the record in this case to consider general literature and Congressional hearings on the grave and permanent harm, particularly to the children involved, that might result from a reduction in welfare payments. Typical of the material before this Court are some of the affidavits quoted below.

A Professor of Pediatrics and Attending Physician in a ghetto hospital with "a great many patients who are recipients" of public assistance swears that many of them "have marginal nutritional status;" that "a decrease in the amount of subsistance which these individuals receive for the purchase of food would create a deficiency in their diets and could lead to clinical malnutrition;" that "malnutrition tends to retard the physical and mental growth" of children and "may greatly diminish the ability of the ndividual to learn;" that this deficiency "will remain with the individual for life;" that children born of "undernourished mothers" have a substantially increased tendency to premature birth with "greater incidence of infant mortality and an

increased likelihood of mental and neurological damage;" and that elimination of special diets and other assistance by reductions such as those proposed by the statute in question will cause damage "to individual recipients . . . so great as to be incalculable."

[18] A Senior Social Worker at a Medical Center swears that "at existing welfare levels most welfare recipients live in a state of constant anxiety, depression, frustration, and physical suffering due to the inadequancy of their welfare grants" and as a result of the proposed reductions the "suffering which will result . . . will cause irreparable, and incalculable, harm."

A Certified Social Worker with 28 years experience, employed by the Community Service Society of New York, Inc., swears that as a result of the reductions, "Serious unattended health problems will multiply and proliferate, children's ability to achieve in school will be even further depleted, diets will be at a starvation level as families try to stretch their grossly inadequate budgets to meet their most basic needs. . .;" and that "Family life, already strained, will be . . . severely jeopardized."

The Chief of Budget Standard Service of the Community Council of Greater New York swears that "deprivation [from the new proposed standard] will result in incalculable hardship and misery to the already severely deprived families in our community."

[19] A Dean of a School of Social Work swears that the proposed reduction will cause "great harm to the physical, mental, emotional and moral health of these families."

A Professor at a medical college and Director of a Neighborhood Health Center swears that "any diminution in income [of the families involved in this litigation] will worsen an already intolerable situation, resulting in irreparable damage."

A Retired Medical Director of the United States Public Health Service serving as Deputy Director of Obstetrics and Gynecology at a ghetto hospital and Professor at a college of medicine swears that "the possible harm afflicted upon pregnant mothers and newborn children is incalculable."

In view of the relatively trivial injuries which result in recovery of more than $10,000 in this Court, it cannot be said that under no view of the facts is the amount in controversy less than $10,000 as to any member of the class. We do not, of course, in considering this jurisdictional matter, pass upon, or express any view with respect to, the accuracy of the affidavits quoted.

C. *Jurisdiction Under 28 U.S.C. § 1343(3)*

Plaintiffs also invoke section 1343(3) of title 28 of the United States Code as a basis for jurisdiction. [20] This provision grants the district courts original jurisdiction of any civil action, irrespective of the amount in controversy, to "redress the deprivation under color of any State law . . . , of any right privilege or immunity secured by . . . any Act of Congress providing for equal rights of citizens." Plaintiffs assert that this section, when read with section 1983 of title 42, grants federal courts jurisdiction over controversies involving substantial individual rights protected by federal welfare statutes. Because jurisdiction to decide the statutory claim of invalidity is clearly founded both on section 1331 of title 28 and upon pendent jurisdiction arising from section 1343 (3) of title 28, we need not and do not address ourselves to this position. *Cf. King v. Smith*, 392 U.S. 309, 312, n. 3 (1968). *Compare* Cover, Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged, Clearinghouse Review, February-March, 1969 at p. 5; Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 112-14 (1967) *with* Note, The Proper Scope of the Civil Rights Acts, 66 Harv. L. Rev. 1285, 1291-93 (1953).

[21] II. *GENERAL NATURE OF FEDERAL-STATE PROGRAM FOR AID TO FAMILIES WITH DEPENDENT CHILDREN*

New York, together with every other state, participates in the AFDC program established by the Social Security Act of 1935. Section 401 of the Act provides that the fed-

eral government shall make "payments to States which have submitted, and had approved by" the federal government "State plans for aid and services" to "needy children and the parents or relatives with whom they are living." These federal payments are made on a matching fund basis. Administration of the program is entirely in the hands of the states, although each state's plan must meet the several requirements of the Social Security Act and the rules and regulations promulgated by the United States Department of Health, Education, and Welfare (HEW). 42 U.S.C. § 602. *See King v. Smith*, 392 U.S. 309 (1968).

Each state participating in AFDC must formulate, in monetary amounts, standards of need and levels of benefits based upon these standards. 45 C.F.R. § 233.20(a)(2)(i), 34 Fed. Reg. 1394 (1969). Theoretically, a standard of need is equal to the total cost of all of the items deemed to be necessary for subsistence. Those whose incomes are below the applicable standard of need are eligible for welfare assistance.

[22] A state is free to determine the items, and their costs, to be included in a standard of need. In practice, it may not include all the neeessary items or the prices used may not reflect true cost. That this is often the case is evidenced by affidavits and supporting memoranda submitted to the Court establishing that welfare budgets tend to be below the level which most studies indicate is necessary for normal daily functioning and healthy family life.

Were a state paying 100% of its standards of need, the amount of the welfare grant to a recipient would be equal to the difference between his income and the applicable standard of need. But, many states' levels of benefits are not determined solely by their standards of need. Some impose a flat maximum on the amount of the benefit—*i.e.*, no family can receive a welfare grant of more than a stated number of dollars, an amount which varies according to the size of the family, even if this sum does not fully cover the budgetary deficit indicated by its own computation. Other states apparently pay only a fixed percentage of need—*e.g.*,

if the standard of need were $100 per month, the state would pay 80% of need and a person without other income would thus receive only $80 per month.

[23] Since "each State is free to set its own standard of need and to determine the level of benefits" (*King v. Smith*, 392 U.S. 309, 318-19 (1968)), the sums paid by different states to comparable families under the AFDC program vary considerably. Thus, 29 states pay 100% of what they define as standards of need, while Mississippi pays only 27% of its standards of need. The average monthly AFDC payment per recipient, as of June, 1968, ranged from a high of $71.75 in New York to a low of $8.50 in Mississippi.

III. *NEW YORK'S CURRENT PROGRAM*

Under present law, New York's levels of benefits have purportedly been designed to fully make up budgetary deficits as defined by its standards of need. The New York Department of Social Services is authorized to establish grant levels "in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities." N.Y. Soc. Serv. § 131(3). Pursuant to section 131 of the New York Social Services Law, the Regulations of the Department of Social Services provide that "all items of basic maintenance and all items of special need required by [individual] case circumstances" shall comprise the recipient's "estimate of regularly recurring need" and are to be included in the [24] welfare budget. 18 N.Y.C.R.R. § 353.1(d). The "recurring cash grant shall be the full budget deficit,"—that is, the excess of "the estimate of regularly recurring need" over the recipient's "available resources." 18 N.Y.C.R.R. §§ 353.1 (a), (d); 353.3(a). *See also* 18 N.Y.C.R.R. § 353.1(c) (a person shall be eligible for assistance if a "budget deficit exists or when the budget surplus is inadequate to meet one or more non-budgeted special needs").

New York welfare allowances have consisted of two separate types of grants. First, the basic, recurring grant to

cover food, clothing, household supplies, school expenses, and other items of basic subsistence, exclusive of rent and fuel for heating which are added to the allowance of the recipient on a separate basis. The amount of this grant varies with the size of the family and the age of the oldest child (18 N.Y.C.R.R. § 352.4 (a), (b)) because older children, particularly growing teenagers, require more in the way of food and clothing.

Payments are presently made according to three schedules promulgated by the State Commissioner of Welfare. One of them, set out below, covers the area of New York City [25] and nearby counties where most persons receiving aid reside.

SCHEDULE SA-I

NEW YORK CITY AND COUNTIES OF: Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westches

Monthly

	One Person	*Two Persons*	*Three Persons*	*Four Persons*	*Five Persons*	*Six Persons*	*Seven Persons*	*Eight Persons*	*Nine Persons*	*Ten Perso*
Oldest child 5 years of age or under		94	125	*152	*180	*204	*234	*262	*293	*32
Oldest child 6 or 7		107	*138	*165	*192	*216	*246	*275	*304	*33
Oldest child 8 or 9		107	152	*178	*205	*228	*259	*288	*317	*34
Oldest child 10 or 11		107	152	191	*218	*240	*271	*300	*329	*35
Oldest child 12 or 13		118	162	201	240	*262	*292	*321	*351	*37
Oldest child 14 or 15		118	173	211	250	283	*314	*318	*372	*40
Oldest child 16 or 17		118	173	221	259	293	335	*364	*394	*42
Oldest child 18 or 19		118	173	221	269	302	345	386	*415	*44
Oldest child 20 or 21		118	173	221	269	312	354	395	437	*46
Adults	66	110	156	198	238	274				

*When there is more than one adult in households with an asterisk, add $16 for each additional ad

For a pregnant woman in any size household, add $5.50.

For an AABD recipient living alone, add $8. [Aid to Aged, Blind and Disabled.]

For each AABD recipient in a family group, add $5.

For each additional person over 10 in the household, add $32.

Any recipient under age 21 is budgeted as a child unless he is receiving assistance as the parent of a mi child and is not regularly attending school. When not budgeted as a child, such minor is budgeted as an ad

[26] The other two schedules, covering upstate areas, are similar in form but somewhat lower in amounts.

In August of each year, the Department of Social Services has adjusted these schedules, based on a cost-of-living survey conducted in May of the same year, to reflect changing price levels. Since prices have been rising for some time, the yearly adjustment has required increases in standards of need and levels of benefits. Schedules presently in effect are based on a May, 1968 cost-of-living survey. They were issued on August 23, 1968 and each local Department of Social Services was required to implement them within nine months of August 1, 1968.

As supplements to the basic grant shown in Schedule SA-1, above, New York provides what it calls "special needs" grants. Special needs grants are designed to cover expenses for extraordinary or non-recurring items such as major items of clothing and furniture and household supplies (18 N.Y.C.R.R. §§ 352.4(c), 352.5(j), medically-dictated special diets (18 N.Y.C.R.R. § 352.4 (b) (7), (8), (9)), moving expenses (18 N.Y.C.R.R. § 352.5(m)), and expenses incident to education (18 N.Y.C.R.R. § 352.5(d)). *See also* 18 N.Y.C.R.R. §§ 352.4(c) (iv) (layette); 352.4(b)(6)(i) (restaurant allowance for persons unable to prepare meals at home); 18 N.Y.C.R.R. 352.5(b), (c) (expenses incident to employment and securing employment); [27] 351.5(g) (child care services); 352.5 (h) (laundry services); 352.5 (i) telephone service when such service is incident to the production of income, health, or safety); 352.5 (p) (transportation expenses to secure medical care or other essential verified transportation needs). These grants are required because it is recognized that the basic schedules provide no surplus from which additional needs can be met.

Pursuant to a "demonstration project" instituted on August 27, 1968 in New York City, many—but not all—of the special needs grants for City residents were replaced by a flat grant of $100 per year per person. A family of four, for example, would receive $400 per year. This flat grant was designed to eliminate the necessity of the welfare reci-

pient applying for many small individual items as they were needed.

Affidavits, studies and testimony before the Court agree that the present schedules, as supplemented by cyclical grants and special grants, are not in excess of present minimum requirements for life at the lowest acceptable level in New York. As the Commissioner of the Nassau County Department of Social Services put it, speaking of the pre-section 131-a situation, "the present standards of assistance provide for life on a level of sustenance, nothing more, and often less." Or, as the Deputy Commissioner in the State [28] Department of Social Services testified, AFDC recipients "of necessity have learned to squeeze every penny."

IV. *NEW YORK'S NEW PROGRAM*

Section 131-a is intended to substantially alter the welfare system in New York State beginning in July, 1969. In place of the present administratively drawn schedules based on annually determined costs of living, the size of the family and the age of the oldest child, it substitutes a system of flat grants set by the legislature and varying solely with the size of the family. All special grants, including the $100 flat cyclical grant for New York City residents are abolished (except for the special grant for the replacement of clothing and furniture destroyed by flood or fire). Two separate schedules of payments are created one solely for New York City and a lower one for the rest of the state. The levels of payments established by the latter schedule may be increased administratively in any social services district within the state based on the cost-of-living, so long as it does not exceed the schedule for the City of New York. *See Rosado v. Wyman,* F. Supp. (E.D.N.Y. 1969) (three-judge court).

Set out below is the statutory schedule of maximum grants to residents in the City of New York:

[29]

Number of Persons in Household						
One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

To these sums is added the cost of rent and fuel. This schedule and the one for the rest of the state, the statute declares, "shall be deemed to make adequate provision for all items of need."

The State's brief describes "the method of establishing the levels set forth in the schedules contained in the statute" as follows:

> The mean age of the oldest child in each size family was ascertained. The mean age rather than the median was used as this produced a more generous result in most cases. The amount of allowance provided in 1968 for a family of each size in cases where the oldest child was of the mean age was then adopted as the allowance for that size family. Where the mean age contained a fraction, the older age was used, again working a benefit to the recipient. Thus, for a family of four, which received amounts ranging from $152.00 to $221.00 (depending upon the age of its oldest child), the mean age of such oldest child was found to be 10.09 and, therefore, $191.00, the figure where the oldest child was ten or eleven, was used [30] as a base amount. To this was added $17.00—the amount necessary to bring the allowance up to $35.35, the subsistence level determined by the United States Government for New York City for a family of four, or a monthly allowance of $208.00. The allowance for the remainder of the state was determined at a differential of $25.00 for a family of four. As the computations of the Department show, these levels, based on the previous allowance including the cost of living increases of 1968, will result in slightly increased benefits to families with younger children and slightly decreased benefits to those with older children. Memorandum of Law in Support of Defendnats' Motion for Summary Judgment, pp. 9-10.

It is not yet clear how such a statistically even-handed technique resulted in even steps of either $43 or $46 as the size of the family increased.

Special grants were seemingly not included in these computations. No attempt was made to average them out across the state and then to add that figure to that of the basic recurring grant.

Each of the individual plaintiffs in this action will suffer substantial cuts ranging up to 20% in their welfare payments as a result of section 131-a. Set out below is a table listing the individual plaintiffs, the number of dependents of each plaintiff, the monthly grant [31] exclusive of rent each is currently receiving, and the maximum under section 131-a that each may receive.

Plaintiff	*Size of Family And Age of Oldest Child*	*Current Grant*	*Maximum Under 131-a*
Rosado	5 people, oldest child 14	$280	$254
Hernandez	3 people, oldest child 16	$218	$162
Miley	10 people, oldest child 15	$535	$469
Abrom	7 people, oldest child 13	$406	$340
Gathers	7 people, oldest child 19	$382	$340
Lowman	8 people, oldest child 14	$396	$383
King	9 people, oldest child 17	$482	$426
Folk	4 people, oldest child 16	$337	$208
Phillips	5 people, oldest child 14	$314.40	$224
Duffy	10 people, oldest child 20	$563.40	$389

(Plaintiffs Phillips and Duffy are residents of Nassau County. If they resided in New York City, or if the Commissioner of Social Services increases their maximums as much as the statute permits, their respective maximums under section 131-a would be $254 and $469.)

As a result of the abolition of special grants, plaintiff Abrom will not receive the following grants now supplied to her: $15 a month for large sized clothing for her children; $15 a month for medically required special diets; [32] and

$5.80 a month for the laundry of diapers. Plaintiff Miley will not be able to receive the following special grants now supplied; $155 a month for a homemaker and $9 a month for a telephone, both required for medical reasons; and $80 a month for special diets for herself and her family.

V. *EFFECT AND PURPOSE OF NEW YORK'S NEW PROGRAM*

In the state's view it "was not the case" that section 131-a resulted in a "reduction of standards;" rather, it contends, section 131-a was intended to, and did, maintain the standard of need while providing administrative streamlining. Reply Memorandum for Defendants, pp. 7-8. Its brief declares:

> the adoption of § 131-a was the fruit of continuous legislative and departmental study of the problem of maintaining a standard of need during a period of sharply increasing numbers of recipients, especially in the ADC program. To avoid a reduction, administrative streamlining and elimination of individual determinations of eligibility for a plethora of special grants was regarded as essential. *Ibid.*

The advantages of a system of flat grants to the recipient are, the state contends,—and the plaintiffs do not dispute this-substantial:

> the flat grant concept, regarded as the most enlightened and progressive method of public assistance payment, eliminating the necessity of the welfare recipient applying for individual items—often a degrading and time-consuming process—and thereby enhancing his dignity, increasing his ability to budget and self-respect, and freeing case workers from bookkeeping decisions in order to allow them to devote their time to counseling of recipients. Memorandum of Law In Support of Defendants' Motion for Summary Judgment, p. 8.

The state's position that section 131-a was designed to reform New York's welfare system and eliminate administrative expense is belied by the statistical information pres-

ently available to this Court and the legislative history of the new statute.

A. *Effect of Section 131-a on Standards of Need and Levels of Benefits*

The data before this Court indicates that section 131-a affects a reduction of New York's standards of need and levels of benefits. While a large percentage of families, particularly those living outside the New York City metropolitan area with young children and with little need for special grants, will receive more under the new system than they do at present, a substantial majority of the AFDC families in the state will suffer a reduction in their payments on July 1, 1969. The amount of the reductions is not yet clear.

[34] Most beneficiaries of the AFDC program live in New York City (657,000 out of a state total of 887,000 was the 1968 monthly average). The Acting Deputy Director of the Bureau of Fiscal Administration of Social Services of the City of New York has made the following computations of the effect of section 131-a based upon statistics supplied by a State Department of Social Services study of July, 1968 and 1969-70 caseload projections:

> The total benefits lost to clients [in New York City] will be $39,142,678. 63.5% of the cases will lose while 36.2% gain. The average annual loss per case will be 343.81 while the average gain is 145.55.

These computations have been controverted by defendants' testimony which indicates that 41.5% of AFDC cases would receive increases, 58.1% would receive decreases and .04% would remain unchanged. One reason for the discrepancy appears to be that defendants' estimates, unlike plaintiffs' are based only on a comparison of the recurring grant and do not attempt to calculate the effect of eliminating the special and cyclical grants.

The effect on upstate residents seems to be less severe; according to defendants, approximately 51% suffer cuts, while 49% are afforded increases. Any possible gain to up-

state residents, who comprise only a small percentage of AFDC recipients, probably does not offset the reductions [35] to City residents of total amount of aid paid. It is not yet clear whether this result would be changed if counties outside New York City took advantage of the opportunity afforded by the amendment to section 131-a discussed in the *per curiam* opinion of the three-judge court, *Rosado v. Wyman*, F. Supp. (E.D.N.Y 1969), and raised their schedules of payments to New York City levels.

Computations of loss by the parties apparently do not include allowance for a cost-of-living adjustment which has heretofore been made administratively each year in May. Under section 131-a, no cost-of-living adjustment will be made in 1969 even though it is undisputed that the New York City Area Consumer Price Index has risen at an average rate of 0.5% per month in the last two years and that the rate of increase has accelerated since February of this year.

Defendants argue that the elimination of the cyclical grant and the special grants are not to be considered in determining whether the standard of payment has been reduced. First, they argue that these grants "were over and above New York's payment of 100% of its standard of need" and, thus, "totally gratuitous on the part of the State." Memorandum of Law in Support of Defendants' Motion for Summary Judgment, p. 25. This argument is difficult to credit. The testimony of witnesses for the plaintiffs and the witness for the defendant agree that New York does not pay more than is [36] required for bare subsistence. Special grants are not luxuries; they are merely a different method for meeting family and individual need for bare necessities. In fact, New York's definition of the standard of need prior to adoption of section 131-a included items covered by special grants:

> An individual or family shall be deemed "in need" when a budget deficit exists or when the budget surplus is inadequate to meet one or more non-budgeted special needs required by the case circumstances and

included in the standards of assistance. 18 N.Y.C.R.R. § 353.1(c).

See also 16 N.Y.C.R.R. § 353.1 (d) ("all items of basic maintenance and all items of special need required by case circumstances" comprise the recipient's "estimate of regularly recurring need").

Second, defendants suggested on argument that the State Commissioner of Welfare was considering the option of regulations providing for some of the special grants "on a purchase of service basis." To date we have not been favored with a copy of such regulations. It is not clear whether these regulations will, if adopted, cover cyclical or special grants to the same extent as they were covered prior to adoption of section 131-a.

[37] In any event, assistance provided on a purchase of services basis could not be considered as "aid paid" by the state within the meaning of section 402(a)(23) of the Social Security Act (42 U.S.C. § 602(a)(23)) in determining whether New York is in compliance with federal standards. Under the AFDC program "aid to families with dependent children means *money payments* with respect to . . . a dependent child or dependent children." 42 U.S.C. § 606 (b) (emphasis supplied). Purchases of services with direct payment to vendors, does not comply with the federal requirements and with HEW regulations designed to protect the "amounts of aid paid" under the AFDC program. *See* HEW Handbook of Public Assistance, Part IV, Section 5120 *et seq.*; 45 C.F.R. 233.20 (a) (ii), 34 Fed. Reg. 1394 (1969). A state apparently may not claim federal reimbursement for the provision by vendor payments or purchase of service of "subsistence and other assistance items" normally included in a standard of need unless the federal statute and regulations specifically so provide. *See* 42 U.S.C. § 602 (a) (13) and (14); 45 C.F.R. Parts 220 and 226, 34 Fed. Reg. 1243, 1354 (1969) (child welfare, family planning and other family services may be purchased; other services must be provided by the agency itself).

[38] The requirement that payments be in cash gives recognition to the right to freedom of choice and to self-respect by the recipient of welfare. Thus, the interpretation of section 406(b) of the Act (42 U.S.C. § 406(b)) in the HEW Handbook reads as follows:

> The provision that assistance shall be in the form of money payments is one of the several provisions in the act designed to carry out the basic principle that assistance comes to needy persons as a right. The right carries with it the individual's freedom to manage his affairs; to decide what use of his assistance check will best serve his interests; and to make his purchases through the normal channels of exchange, enjoying the same rights and discharging the same responsibilities as do friends, neighbors, and other members of the community. The Social Security Administration's interpretation of "money payments" recognizes that a recipient of assistance does because he is in need, lose his capacity to select how. not, because he is in need, lose his capacity to select how, when, and whether each of his needs is to be met.

B. *Legislative History of Section 131-a*

Motive and purpose of the legislature may be considered in determining what it in fact did. *Cf. Williams v. Dandridge*, ___ F. Supp. ___ (D. Md. 1969) (maximum grant regulation motivated by "an inadequate State appropriation"). An examination of the legislative history of section 131-a, read together with the state budget, casts considerable doubt upon the defendants' contention that the new schedules were designed wholly, or even primarily, to meet the demands of efficiency.

[39] The proposal to convert to a flat grant system was initiated by the New York State Board of Social Welfare. In its report to the Governor in May, 1968, it recommended flat grants "based on family size and the age of the oldest child" to "include food, clothing, personal incidentals, household supplies, school expenses" and the like, with "additional money amounts" in certain circumstances such as special diets or moving expenses, which are not

common to all recipients." Challenge and Response, 4 (May 1968).

This proposed change was not designed to reduce standards of need or payments. In a letter of Commissioner Wyman to the Governor's Counsel dated September 13, 1968, the flat grant system was spelled out in great detail. The schedules included were those in present section 131, not the reduced schedules in section 131-a. Moreover, many special grants such as those for special clothing and for diet supplements for pregnant women and medical patients were provided. And there was a provision for annual repricing of schedules "whenever the repricing shows an increase or decrease of 2% or more."

This proposal was never introduced in bill form; in its stead, section 131-a was substituted. The reason for this change is revealed by an examination of the labyrinth process leading to the adoption of the 1969-70 state budget.

[40] The Governor's proposed budget, dated January 21, 1969, did not indicate any plan for a shift in methods of computing standards of need. See Executive Budget for the Fiscal Year April 1, 1969 to March 31, 1970, 566-67, 571-72, 778-780. AFDC payments were expected to continue "to increase principally because of the increasing cost of living and a continued demand by public assistance recipients for the granting of special need items in addition to the basic subsistence allowances." *Id.* at 779. The percentage of federal aid was expected to decline because of a "freeze" on the number of children to be aided and restricted participation in cases of aid due to unemployment of a parent. *Ibid.* Based upon monthly AFDC averages, the projected number of recipients for 1968-69 was 917,235 and for 1969-70 it was 1,095,704. The average budgeted monthly grant was $74.57 for 1968-69 and $83.37 for 1969-70. *Id.* at 779. The total 1969-70 to AFDC program cost was projected at $1,096,172,000; $440,195,000 was anticipated in federal aid. *Id.* at 778. The estimated cost-of-living increase for 1969-70, based upon the system then in effect, was $5,000,000 and this sum was apparently

included in the $1,096,172,000 figure. Since the share of the state and of local social service districts is almost equal (*Id.* at 778, $321,125,000 was budgeted for 1969-70 as the state's share of the 1969-70 AFDC [41] program. The total Local Assistance Fund for State Aid Programs for the Department of Social Services was budgeted at $1,040,514,000—*Id.* at 786. *See also* Sen. 1689, Ass. 2305 (1969).

Because "necessary expenditures are expected to outstrip available funds," the Governor reported, "a reduction in the level of recommended budget expenditures by approximately 5 per cent across-the-board may be required." Executive Budget for the Fiscal Year April 1, 1969 to March 31, 1970, M7. The Local Assistance Fund, including AFDC contributions by the state, was to be "limited to 95 per cent of the amount of expenditures otherwise estimated . . . to keep expenditures within available income." *Id.* at 739. This would have reduced the category of state aid to AFDC by approximately $16,000,000 and all programs of state social service local aid would have been reduced by $52,000,000 to $988,000,000.

It is not clear from the Governor's proposals whether the total AFDC program cost was intended to be reduced 5% from $1,096,172,000, for a cut of approximately $55,000,000, or whether the local social service districts were expected to increase their share, leaving the total program cost unchanged. In any event, no one suggested that the 5% cut was anything but a money saving device.

[42] During the legislative session the Governor's proposed budget was modified to provide greater aid than the Governor had requested for some items but to reduce the state AFDC appropriation even further. The budget bills do not show the detailed amounts for each category of local aid but show a lump sum for all categorical assistance. Instead of $988,000,000 proposed by the Governor (after his 5% cut), $913,000,000 was appropriated. Sen. 1689-A, Ass. 2305-A (adopted March 29, 1969, ch. 49, L. 1969). This constituted a reduction of approximately 12% from the original projected cost. We are informed that depart-

mental computations indicate that $297,441,000 was the amount intended for the AFDC program, a saving of $23,684,000 or about 7% over the Governor's Budget. When the $5,000,000 amount in the Governor's Budget for 1969 cost-of-living increases is eliminated the reduction is $18,684,000, or about 6%. Since the state's share is some 34%, the decrease in total AFDC payments under the program seems to have been at least some $50,000,000.

A further reduction of $42,000,000 was made by the supplemental budget, making the total reduction in local aid for categorical assistance some 16% from what the Governor's Budget had estimated as projected costs. Sen. [43] 5692, Ass. 7205 (adopted May 2, 1969, ch. 340, L. 1969). Defendants have indicated, in a letter to the Court dated May 14, 1969, that the $42,000,000 cut in the Supplemental Budget was taken "from the $297,441,000 figure" for local AFDC aid. We are told by the State that this reduction was made in contemplation of increased federal aid and that if this sum is not supplied by the federal government "the 1970 Legislature would be requested to cover the amount in a supplementary budget."

Timing of legislative action shows the close relation between the new AFDC program and budgetary decisions. Section 131-a was not introduced until February 18, 1969 in the Assembly (Ass. 6620) and March 27, 1969 in the Senate (Sen. 5419), some time after the Governor's Budget Message was delivered on January 21, 1969. The amendment was adopted on March 29, 1969, the same day as the budget. There is good reason to believe, when the budget is read with section 131-a, that a cut in the projected cost of the total AFDC program as well as in the state contribution was intended.

Since a reduction of levels of payments, based on projections, was likely to be required to achieve these budgetary reductions, since all affidavits and testimony indicate that payments have not been above the standard of need, and since New York continues to purport to pay [44] at 100%

of standard of need under section 131-a, there is strong support for the contention that standards of need and levels of payments were reduced.

This Court is not, of course, concerned with justifications for state budgetary decisions, nor does it sit to discourage desirable improvement in the efficiency of state welfare programs. The issue before us is whether the system of reducing standards of need and levels of payment embodied in section 131-a violates federal statutes. We turn now to the relevant federal provision for an answer to that question.

VI. *FEDERAL LIMITATIONS ON REDUCTIONS IN AID TO DEPENDENT CHILDREN*

A. *Purpose*

Paragraph 23 of subdivision (a) of section 402 of the Social Security Act of 1935, as amended (42 U.S.C. § 602 (a) (23), requires that each state's AFDC plan must:

> provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

This provision was effective January 2, 1968. Pub. L. 90-248 Title II, § 202(b), 81 Stat. 821.

Defendants contend that 402(a)(23) should be [45] narrowly construed. They interpret it as being primarily aimed raising a state's standards of need and as not controlling a state's levels of benefits to AFDC recipients. In support of this construction of the statute, defendants rely upon the position of HEW as expressed in its amicus brief filed in *Lampton v. Bonin*, ___ F. Supp. ___ (E.D. La. 1969) and the implementing regulation of HEW which would permit a state to make downward adjustments in the amount of AFDC payments through the device of "ratable reductions"–*i.e.*, percentage reductions applied to the standard of need. 45 C.F.R. § 233.20(a) (2)(ii), 34 Fed. Reg.

1394 (1969). We disagree and hold that a broader construction of 402(a)(23) is required by the language, statutory history and good sense.

Section 402(a)(23) plainly states that both the "amounts used by the State to determine the needs of individuals"–*i.e.*, the standard of need–and "any maximums that the State imposes on the amount of aid paid to families"–*i.e.*, the level of benefits–be adjusted "to reflect fully changes in living costs since such amounts were established." The adjustment contemplated by 402(a)(23) is undoubtedly an upward one in view of the inflationary trend this country has experienced over the last two decades. The one judge who has heretofore considered this question [46] at length has reached a similar conclusion. *Lampton v. Bonin*, ___ F. Supp. ___, ___ (E.D. La. 1969) (dissent, setting out legislative history at length; the majority did not reach the question) ("Congress' intention to compel the states to raise ADC payments"). *See also Dandridge v. Williams*, ___ F. Supp. ___, ___ (D. Md. 1969) ("designed to increase benefits to keep pace with living costs").

This federal provision grew out of an attempt to reform the inequitable and unsatisfactory aspects of our present welfare system resulting from the inadequate and widely varying level of grants among the states. The solution first proposed by HEW would have required all states to meet in full their own need standards and to adjust payments annually so as to maintain payments at the 100% level despite intervening inflationary price rises. Congress put off enacting any basic change to allow further study and consideration of alternatives. At the same time, it did take an interim step, a holding action against further deterioration in levels of benefits.

Section 402(a) (23) embodies that interim and temporary solution. It creates a floor under present levels of benefits by prohibiting future cuts in welfare payments and by requiring that all states provide at least [47] one increase by July 1, 1969 to at least partially compensate for the rise in the cost-of-living.

As already noted, section 402(a) (23) grew out of an Administration proposal to require all states to pay 100% of need and to make annual cost-of-living adjustments beginning July 1, 1969. This proposal was originally embodied in the bill to amend the Social Security Act introduced in the House in 1967 at the request of the Administration. Section 202 of H.R. 5710, 90th Cong., 1st Sess. The bill ultimately reported out by the House Ways and Means Committee and passed by the House, H.R. 12080, contained no such provision.

The Administration renewed its request in the hearings before the Senate Finance Committee and proposed the following amendment to the House Bill:

> [each state plan must] provide (A) effective July 1, 1969, for meeting . . . all the need, as determined in accordance with standards applicable under the plan for determining need, of individuals eligible to receive aid to families with dependent children . . . and (B), effective July 1, 1969, for an annual review of such standards and . . . for updating such standards to take into account changes in living costs. Hearings Before the Committee on Finance, U.S. Senate, 90th Cong., 1st Sess., on H.R. 12080 at 635.

See also *Id.* at 716 (statement of HEW on its proposed amendments to H.R. 12080).

[48] Secretary of Health, Education and Welfare John W. Gardner, in his testimony before the Committee in support of this amendment, specifically referred to the need to increase the level of benefits:

> The House bill does nothing to improve the level of State public assistance payments. As things stand today, the States are required to set assistance standards for needy persons in order to determine eligibility—but they need not make their assistance payments on the basis of these standards. The result is that welfare payments are much too low in a good many states. . . .

> We strongly urge you to adopt the administration's proposal requiring states to meet need in full as they determine it in their own State assistance standards, and to update these standards periodically to keep pace with changes in the cost of living. Hearings Before the Committee on Finance, U.S. Senate, 90th Cong., 1st Sess., on H.R. 12080 at 216.

Similar testimony was given by Undersecretary Wilbur Cohen:

> It is this serious discrepancy between what the States themselves determine to be minimal need and the amounts they will actually pay that has led us to strongly recommend that States be required to meet needs in full as they determine them. . . .
>
> But it is not enough only to require the States to meet need standards. They must assure that these standards reflect current prices. Hearings Before the Committee on Finance, U.S. Senate, 90th Cong., 1st Sess., on H.R. 12080 at 259.

[49] While Messrs Gardner and Cohen referred only to state dollar maximums in the illustrations used in their testimony (*id.* at 255-260), it was clear from their statements and colloquy with those Senators present that concern was being expressed about any method used by the states to pay less than was indicated by their standards of need. Part of the record reads as follows:

> SENATOR RIBICOFF: What happens, Mr. Cohen, with the people who receive payments so far below the standard?
>
> MR. COHEN: Well, if a State does not pay its full standard, two things can happen. One is, as Senator Long indicated, that they may make up the difference from income from social security or earnings so that they still might meet the standard in those cases where an individual has social security or could work. But, I might say that out of the 2 million people who are old-age assistance recipients, the average age being 75, quite a number of them can-

not work, although half of them do have social security beneifits.

SENATOR RIBICOFF: I know, but you take all that into account in the standards that are being set. What they are receiving is not just a question of the amount they receive from the welfare agencies. You take into account all they receive. What happens to the child or the adult who receives so much less than what you consider or is considered a proper standard? How do they live?

SECRETARY GARDNER: It shows up most amount.

SENATOR RIBICOFF: How do they live?

MR. COHEN: They have to cut back on their food and clothing and other needs to live on the amount that the State gives them.

[50] SENATOR RIBICOFF: Well, is not a study made or do not you know what happens to these people? I mean just what is happening to them?

MR. COHEN: Well, I think that the evidence shows—I do not have it immediately before me—that many of these children and these families grow up without adequate food, without adequate medical care, and certainly their whole aspirations for improving their educational status are stunted, and I think that the evidence from the State administrators when you hear them will bear that conclusion out.

SECRETARY GARDNER: It shows up most clearly, I think, in the medical data. You will find a higher incidence of just about every kind of medical disorder and physical handicap in these youngsters—malnutrition and everything else.

SENATOR RIBICOFF: Well, in looking to the cost to society ultimately, the people who are below standard cause a greater drain eventually upon what the society has to pay out in every conceivable way, is that not right?

SECRETARY GARDNER: No question about that, Senator.

MR. COHEN: I might add, Senator, just to give you a figure which I will come to later, that the average payment per child for the Nation as a whole is around $36 per month per child. That is the actual payment, which is a little bit more than $1 per day per child.

Now, I think, that this is an indication of the rather low level and inadequacy of payments that exist in the country as a whole. Some are higher and some are notably and substantially lower.

Id. at 258-59.

The bill reported out of the Senate Finance Committee, and passed by the Senate, reflected a compromise on this issue. The requirement that all states pay full need [51] was rejected, but the second recommendation—that they be required to annually increase levels of payments to reflect changes in living costs—was contained in the Senate version. The bill is practically identical to 402(a) (23) except for a mandated annual cost-of-living adjustment:

> by July 1, 1969, and at least annually thereafter, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and that any maximums that the State imposes on the amount of aid to families will have been proportionately adjusted.

See also Senate Report No. 744, 1967 U.S. Code Cong. & Admin. News 3133.

In the House-Senate Conference Committee, the requirement for annual increases was dropped; only one adjustment prior to July 1, 1969 was to be required. The Conference Committee Report explains:

> The new section [Senate amendment] also amended section 402(a) of the Act to require that by July 1, 1969, and annually thereafter, each State . . . must adjust its standards so as to reflect current living

> costs and make proportionate adjustments in any maximums . . . .
>
> Under the [Conference Committee] agreement, the new section 402(a) provision (for adjustments to reflect living costs) would require States to make only one adjustment before July 1, 1969 . . . . Conference Committee Report No. 1030, 1967 U.S. Code Cong. & Admin. News 3209.

[52] The language of the basic requirements of 402(a) (23) remained virtually unchanged throughout its legislative evolution. There is no hint from either committee that it intended to change the purpose of the section as expressed by Administration spokesmen. Hence, there is no reason to believe that Congress failed to appreciate the import and plain meaning of the language in 402(a) (23).

B. *Requirements of section 402(a) (23)*

1. *Adjustment of Standards of Need*

Section 402(a)(23) simply requires that all states increase benefits once to keep pace with living costs. The only significant variation in the change required in different states is the percentage adjustment required, which depends on when prior to January 2, 1968–the date 402(a) (23) became law–a state had last repriced its need standards. The more outdated the prices used to determine need, the greater the required adjustment.

All items comprising standards of need must be repriced. While items need not be added, no item previously included and still required by recipients may be omitted, else the effect of repricing would be nullified. The content of the repriced standards must be equivalent to that of the old. Any consolidation through a combining of items "may not result in a reduction in the amount of the standard." 45 C.F.R. § 233.20(a) (2) (ii), 34 Fed. Reg. 1394 (1969).

[53] 2. *Increase in Levels of Benefits*

Section 402(a) (23) by its terms requires every state to increase its levels of payments by an amount sufficient to offset the rise in the cost of living. An upward adjustment of "any maximums that the State imposes on the amount of aid paid" automatically necessitates an increment in the amount of such aid.

Defendants contend that this requirement of increased levels of benefits does not apply to states such as New year, which have been paying full need or to states which employ percentage reduction systems. "Maximums," according to defendants, is a word of art in welfare law jargon which refers solely to dollar maximums and should be so construed within the meaning of the statute.

This argument is not persuasive. Section 402(a) (23) speaks of "any maximum," not just dollar maximums. If a state pays 100% of need, a standard of need constitutes both the maximum and the amount of aid paid. Repricing the standard of need serves, without more, to increase the level of payments. Both the creation and the reduction of dollar maximums are equal evasions of the statute.

The invalidity of this leg of defendant's argument can be illustrated by a hypothetical. The standards of need in State X and State Y are $200 per month. State X pays full [54] need, or $200, while State Y imposes a dollar maximum of $100. The cost of living has risen 10% in both states. Under defendants' interpretation of 402(a) (23), State Y would have to increase its monthly payments to $110, while State X could lawfully reduce them to $100, or even $50.

Section 402(a) (23) applies in the same manner to a percentage reduction system. The maximum which must be proportionately adjusted is not, as defendants would have us believe, the number representing the percentage reduction but, rather, the dollar figure resulting from the application of the percentage to a family's need as determined by the state's standard of need.

For example, if a state had a standard of need of $100, and paid 80% of need, the recipient would receive $80. If the need standard were now raised to $120 to reflect a rise in living costs, and the state continued to pay 80%, the recipient would receive $96. The rise in living costs would thus be reflected in increased aid to the recipient.

We do not decide whether section 402(a) (23) precludes a state from converting to a "flat grant system" by averaging out all the special grants across the state and then adding this figure to that of the basic recurring grant, or by including all items previously covered by special grants as part of the regular grant, or by some other technique. Nor [55] do we decide whether any flat grant system discriminating against large families or families with older children would be invalid. *But cf. Westberry v. Fisher*, ___ F. Supp. ___, ___ (D. Me. 1969) (state regulation invalid if "families with a large number of dependent children receive less favorable treatment under Maine's AFDC program than families with a small number of dependent children"). All we need now decide is that section 402(a) (23) precludes a state from making changes resulting in either reduced standards of need or levels of payment. *Cf.* 45 C.F.R. § 233.20 (a) (2) (ii), 34 Fed. Reg. 1394 (1969) (consolidation of the standard of need "may not result in a reduction in the content of the standard").

C. *HEW Implementing Regulation*

"The interpretation . . . by those charged with its administration must be given great weight by courts faced with the task of construing the statute." *Zemel v. Rusk*, 381 U.S. 1, 11 (1965). But an administrative interpretation is by no means decisive when it departs from the meaning of the language and purpose of the statute; "deference" is all that is required. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *United States v. American Trucking Assn's, Inc.*, 330 U.S. 534, 543 (1940); *Hagar Co. v. Helvering*, 308 U.S. 389, 394 (1940). *See* cases collected in *Williams v. Dandridge*, [56] ___ F. Supp. ___, ___ (D. Md. 1969) (supplemental

opinion). Any HEW regulation or interpretation "inconsistent with the controlling federal statute" may not be relied upon to justify denial of AFDC benefits. *King v. Smith*, 392 U.S. 309, 333, n. 34, 88 S. Ct. 2128, 2141, n. 34 (1968); *Williams v. Dandridge*, ___ F. Supp. ___, ___ (D. Md. 1969) (supplemental opinion).

HEW agrees that the pricing of the need standard must be updated and that maximums must be appropriately adjusted. However, if a state has insufficient funds to meet need in full under the adjusted standard, HEW would permit it to pay to recipients only a given percentage of the adjusted standard of need. Its regulation provides that a state AFDC plan must:

> provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. *In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions* in accordance with subparagraph (3) (viii) of this paragraph [adjustments must be uniform statewide]. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards. 45 C.F.R. § 233.20 (a) (2) (ii), 34 Fed. Reg. 1394 (1969) (emphasis supplied).

[57] Defendants do not contend that section 131-a establishes any ratable percentage reductions of grants applied to the standard of need. "Section 131-a," they insist, "provides for the full standard of need." Memorandum of Law in Support of Defendants' Motion for Summary Judgment, p. 22. New York will continue to purport to pay on the basis of 100% of its standard of need. *Id.* at 23. The valid-

ity of the escape route for section 402(a) (23) supplied by the regulation is thus not formally before the Court.

Nevertheless, since this regulation provides the underlying foundation for defendants' position and since the underscored portion of it cannot stand in the face of our interpretation of 402(a)(23), we feel obligated to briefly consider the regulation's validity. Were HEW correct in its assertion that 402(a) (23) can be easily circumvented by a mere technical adjustment of theory and figures and that it does not impair a state's freedom to set any level of payments it chooses—so long as the proper verbiage is used in the state's statutes—we would be reluctant to seriously consider invalidating section 131-a. We are, after all, not playing a legislative word game but dealing with the allocation of tens of millions of dollars in tax receipts and with the well-being of a million New York citizens.

[58] Our analysis of the plain meaning of section 402(a) (23) and its legislative history and our construction of "maximums" within the meaning of the statute are equally relevant here and need not be repeated. Only three additional points need be made.

First, it seems an exercise in sophistry to infer, as does HEW, that states are free to do what they will with percentage reductions since 402(a) (23) does not specifically refer to them and the pecentage figure itself need not be increased. *See Lampton v. Bonin*, ___ F. Supp. ___, ___ (E.D. La. 1969) (dissent; majority did not reach issue). As noted above, the number representing the percentage reduction is not the maximum to be "proportionately adjusted." Moreover, since the level of payments is automatically adjusted so long as the standard of need is updated and the percentage is kept constant, Congress' failure to mention percentage reductions is easily explainable by the fact that "there simply was no need to in order to achieve the desired results." *Id.* at ___.

Second, to permit ratable reductions in the manner suggested by HEW would nullify the Congressional intent to

increase the level of benefits and would render the statute virtually meaningless. A state could avoid increasing payments by merely lowering the percentage figure or, if it [59] had not been a percentage reduction state, by adopting a percentage system. Compliance with 402(a) (23) could be secured by a mere administrative adjustment of numbers without effecting any substantive change. States would be able to set any levels of payments—the identical position they were in prior to the enactment of 402(a) (23). This is highlighted by the very example put forth by HEW to illustrate its position:

> The fact that section 402(a) (23) does not affect percentage reductions *allows States to retain considerable flexibility* as to the amount of their assistance payments. We return to our example where a State with a need standard of $100 paid 80% of need and the recipients received $80. Because of a 20% rise in living costs, the State's need standard is raised to $120. Such a State could now pay 66-2/3% of need, and the recipients would still receive $80. Or the State could pay 100% of need, or 80%, or 50%, according to the available funds. States which formerly paid 100% of need might now change and pay a lesser percentage. States with a system of maximums might in addition compute payments on the basis of a percentage of need. HEW Amicus Brief submitted in *Lampton v. Bonin*, at page 10 (emphasis supplied).

"Nullification" rather than "flexibility" is a more apt word for such an interpretation.

Finally, were HEW correct, not only will assistance not be increased as Congress intended, but the implementing regulation, by encouraging states to switch to percentage reduction systems, is likely to lead to lower payments to present welfare recipients. The net result, under a percentage reduction system, of raising the standard of need without a concomitant increase in available funds, is to increase the number of persons eligible for relief at the expense of

those already on relief. It is inconceivable that Congress intended the most poverty stricken members in our society to pay the added cost of those newly added to the AFDC rolls.

VII. *CONCLUSION*

As a participant in the AFDC program, New York may not breach "its federally imposed obligation to furnish 'aid to families with dependent children * * * with reasonable promptness to all eligible individuals * * * .'" *King v. Smith*, 392 U.S. 309, 333 (1968). The state's plan "must conform with several requirements of the Social Security Act." *Id.* at 317. One of the federally imposed conditions –resulting from enactment of section 402(a) (23)–is that participating states not reduce either standards of need or levels of benefits below those in force on January 2, 1968 as revised to reflect cost-of-living increases between that date and July 1, 1969. Any "state law or regulation inconsistent with such federal terms and conditions is to [61] that extent invalid." *Id.* at 333, n. 34; *Solman v. Shapiro*, ___ F. Supp. ___ (D. Conn. 1969); *Westberry v. Fisher*, ___ F. Supp. ___ (D. Me. 1969) (invalidity of maximum grant regulations); *Dews v. Henry*, ___ F. Supp. ___ (D. Ariz. 1969); *Williams v. Dandridge*, ___ F. Supp. ___ (D. Md. 1968).

We do not hold that New York "must appropriate additional funds to support its participation" in the AFDC program. *Williams v. Dandridge*, ___ F. Supp. ___ (D. Md. 1968). We hold only that if it participates it must comply with federal law.

There is a substantial possibility that section 131-a of the New York Social Services Law does reduce both the standards of need and levels of benefits in violation of federal law. If this section is declared to be invalid and irreversible steps to implement section 131-a have been taken or changes on actual payments pursuant to section 131-a have been made, irreparable harm to recipients of AFDC will

result. On balance, the probability of harm to plaintiffs from a failure to grant a preliminary injunction far outweighs possible harm to the state in granting one. Accordingly, the parties will submit proposed orders for a preliminary injunction by 4:30 p.m. on Friday, May 16, 1969. The attorneys for the parties should be present in chambers at that [62] time so that arrangements for further proceedings can be made.

VIII. *SOME QUESTIONS OF FACT*

In preparation for the meeting in chambers, attorneys should consider the questions of fact listed below and be prepared to raise any additional issues they desire the Court to consider.

1. What is the total average grant (recurring and special) per family of each size?

(a) New York City

(b) New York State outside of New York City

(c) New York State as a unit

2. What is the average amount that a family of each size receives in special grants?

(a) New York City

(b) New York State outside of New York City

(c) New York State as a unit

3. What is the number of families of each size receiving AFDC assistance?

(a) New York City

(b) New York State outside of New York City

(c) New York State as a unit

4. What is the number of families of each size with an oldest child above the mean for that size family?

(a) New York City

[63] (b) New York State outside of New York City

(c) New York State as a unit

5. The same question as (4) as regards families of each size with a child below the mean age.

6. What is the total number of families receiving increased grants under section 131-a (taking into account cyclical and special grants available under present law)? What is the total dollar amount of the increases? What is the average increase per family (broken down into families of each size)?

(a) New York City

(b) New York State outside of New York City

(c) New York State as a unit

7. The same question as (6) as regards decreases.

8. Is it contemplated that any persons presently eligible as an AFDC recipient will be declared ineligible for such aid under section 131-a?

9. Why do the levels of payments in section 131-a increase by the same amount as the size of the family increases?

10. What is the number of AFDC recipients in each of the counties comprising the present SA-1 schedule other than the five New York City counties?

11. What effect will the new Food Stamp program have on AFDC recipients? Who will be eligible? Will it be applicable [64] throughout New York State? When will this information be available?

12. The same question as (11) as regards the Day Care Center program.

13. What other programs, if any, are to be initiated or expanded to meed AFDC needs? When?

14. What amounts were appropriated in the budget passed March 29, 1969 for each of the forms of categorical aid?

15. What amounts were appropriated in the Supplemental Budget passed May 2, 1969 for each of the forms of categorical aid?

16. How were the figures referred to in questions (14) and (15) determined, *i.e.*, what statistical bases were employed in reaching the final dollar amounts in each of these categories?

17. What were the total dollar amounts appropriated in the 1968-69 fiscal year for AFDC in (a) the Local Assistance Fund Budget adopted in 1968, and (b) all deficiency budgets adopted in the 1968-69 fiscal year?

18. Does the difference in $23,684,000 between the proposed budget and the budget actually adopted as regards the AFDC appropriation represent administrative savings or partial savings from the abolition of special grants? What figures were used to answer this question?

[65] 19. Has there been any further correspondence between the state and HEW regarding the AFDC program?

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[66] [SUMMARY JUDGMENT]
June 18, 1969

In this Court's opinion granting plaintiffs' motion for a preliminary injunction, we held that section 402(a) (23) accomplishes two results. First, it creates a floor under present levels of benefits in AFDC by prohibiting cuts in welfare payments. Second, it requires that all states provide at least one increase in both standards of need and levels of benefits by July 1, 1969 to at least partially compensate for the rise in the cost-of-living.

There is "no genuine issue as to any material fact" on the question whether section 131-a of New York's Social Services Law meets this dual requirement. The statistical data supplied by both defendants and plaintiffs, while differing in some particulars, is consistent so far as it is legally relevant.

The change to the flat grant system—long favored by some as a more enlightened method of public assistance—

has been used as a subterfuge to enact drastic cuts in both standards of need and levels of benefits to meet the exigencies of a state budget in violation of the Congressional mandate embodied in section 402(a) (23). Accordingly, plaintiffs' motion for summary judgment must be granted.

[67] Set out below are the Court's findings of fact and conclusions of law:

1. The schedules contained in section 131-a effect a substantial reduction in standards of need and levels of benefits.

The estimates submitted by the state are that 111,899 welfare families will receive increases in benefits under section 131-a; that the total monthly amount of these increases is $1,716,910; and that the average monthly amount of the increase per family is $15.34. The decreases under section 131-a are greater in all respects: 141,313 families will receive decreases; the total monthly amount of these decreases is $3,420,441; and the average monthly decrease is $24.20. These figures are set out in the table below:

	Number of Families	Total Monthly Amount	Monthly Average Change
Increases	111,899	$1,716,910	$15.34
Decreases	141,313	$3,420,441	$24.20

These statistics reflect only the changes in the regular recurring grant plus, for New York City only, the amount of the cyclical grant. They do not include the loss to dependent children of all the special grants—available under present law because they have heretofore been deemed by the state as essential to children's welfare; these special [68] grants are abolished under section 131-a to achieve a further reduction in state expenditures of many millions of dollars.

Approximately 80% of the AFDC recipients in the state reside in New York City. The figures for New York City are set out below:

	Number of Families	Total Monthly Amount	Monthly Average Change
Increases	79,838	$1,091,471	$13.67
Decreases	110,908	$2,772,313	$25.00

Plaintiffs have submitted statistics which attempt to compute the effect of eliminating non-recurring special grants for New York City residents. With this new variable included the number of families receiving increases in New York City under section 131-a drops to a mere 245 and the total monthly amount of these increases is $530 for all of New York City. Only a very rare class of New York City families–those with six or seven children, the oldest of whom was five years of age– would receive any increase at all. Conversely, the number of families suffering decreases rises to approximately 173,900 and the aggregate dollar amount of their decreases totals approximately $5,950,000 per month.

[69] Set out below is a table comparing the total average grant (recurring and special) per family in New York City under present law and under the section 131-a schedule:

Family size	Present Law	Section 131-a
2	$137.42	$116
3	$197.13	$162
4	$250.84	$208
5	$315.55	$254
6	$352.26	$297
7	$418.97	$340
8	$463.68	$383
9	$505.39	$426
10	$571.10	$469

2. The elimination of special grants constitutes a reduction of standards of need and levels of benefits.

3. The elimination of the cyclical grant for New York City residents constitutes a reduction of standards of need and levels of benefits.

4. The elimination of differentiated larger grants for the needs of families with older children and the failure to provide for families with children above the mean age of the oldest child in families of a given size constitutes a reduction of standards of need and levels of benefits.

5. The transfer of seven counties which are presently included in the SA-1 schedule to a lower schedule constitutes a reduction of standards of need and levels of benefits for AFDC recipients of these counties. The small upward adjustment of the schedules of payments in some counties outside New York City promulgated administratively pursuant to the amendment to section 131-a discussed in the *per curiam* opinion of the three-judge court, *Rosado v. Wyman*, ___ F. Supp. ___ (E.D.N.Y. 1969), does not offset the reductions; the new schedules constitute a reduction in current standards of need and levels of benefits.

6. Some persons who presently receive supplementary AFDC benefits will no longer be eligible for assistance under section 131-a.

7. New public assistance programs instituted by New York State will not offset the reductions effected by section 131-a.

(a) Food Stamp Program. The Food Stamp Act provides that participating states shall not decrease welfare payments as a result of participation in this program. 7 U.S.C. § 2019(d). The state concedes that "Neither the donated commodities or food stamps may be deemed or construed to be public assistance in whole or in part or a substitute therefor. Participation in either program by recipients or others is completely voluntary."

In any event, federal funding is not yet certain and in many instances all that will be involved is a change from the Commodity Distribution Program. No [71] projected food stamp program can offset the reductions in benefits described above.

(b) Day Care Center Program. This program involves only a handful of recipients. It cannot serve as a sub-

stitute for AFDC payments, and it will be some time before the program is significantly expanded. No projected day care center program can offset the reductions in benefits described above.

(c) Other Programs. Such programs as the Work Incentive Program are of minor significance and have little effect on the issues before us. Neither this program nor any other projected program nor any combination of such programs can offset the reduction in benefits described above.

8. The Governor's 1969-70 Proposed Budget contained an AFDC appropriation request of $321,125,000 as a part of a total Local Assistance Fund request of $1,040,014,000. In the March 29, 1969 budget bill, the legislature appropriated only $912,014,000 to the Local Assistance Fund—a reduction of $128,000,000. Of this sum, $290,459,000 was earmarked for AFDC—a reduction of approximately $30,000,000 or 10%. When the $5,000,000 amount in the Governor's Proposed Budget for 1969 cost-of-living increases is eliminated, the reduction for AFDC is [72] approximately $25,000,000. Since the state's share is approximately 30%, the decrease in total AFDC payments under the New York State program is no less than $75,000,000.

Defendants state that the $25,000,000 reduction in the state's share of AFDC costs "is the result of the allowance schedules in Section 131-a including the elimination of special grants, the revision of Section 139-a, addition of Section 132-a and any other changes made by Chapter 184, Laws of 1969." However, no substantial portion of the savings could have been expected to result from changes in the welfare law other than section 131-a. The $25,000,000 reduction represents almost entirely savings in AFDC grants.

19. The additional $42,000,000 reduction in the AFDC appropriation contained in the May 2, 1969 Supplemental

Budget was enacted in contemplation of increased federal funds and will not affect AFDC payments.

Plaintiffs' motion for summary judgment is granted.

/s/ Jack B. Weinstein
U.S.D.J.

BB. Order by Judge Weinstein Granting Permanent Injunction (Document No. 79)

IN THE UNITED STATES
EASTERN DISTRICT OF
NEW YORK

JULIO ROSADO, *et al.*,

Plaintiffs

v. 69 Civ. 355

GEORGE K. WYMAN, *et al.*, *ORDER*

Defendants

Upon finding invalid the system of "maximum monthly grants" and schedules of need prescribed in New York Social Services Law § 131-a, Laws Ch. 411, May 9, 1969, as amended, March 31, 1969, it is:

ORDERED, ADJUDGED AND DECREED that:

1. Defendant Wyman, his successors in office, agents and employees and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Children program under state supervision, are hereby enjoined from implementing or utilizing said Section 131-a and, pursuant thereto, from denying, reducing or discontinuing any benefits in the form of either regular recurring grants or special grants now available to recipients of Aid to Families with Dependent Children in New York (including the quarterly "flat grant" in New York City and special grants throughout the State).

2. This order shall take effect immediately.

Dated: Brooklyn, New York
June 18, 1969

/s/ Jack B. Weinstein
U.S.D.J.

This order is stayed until 4:00 P.M. on June 19, 1969.
So ordered.

Jack B. Weinstein

CC. Opinion of United States Court of Appeals for the Second Circuit Vacating Preliminary and Permanent Injunctions, Reversing Summary Judgment and Affirming Dissolution of Three Judge Court (Document Nos. 65, 66, 67 [Court of Appeals])

(1) Appeals from an order and a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, —— F. Supp. —— (1969) and —— F. Supp. —— (1969), granting a preliminary injunction and a permanent injunction against enforcement of Section 131-a of the New York Social Services Law, Law of March 30, 1969, ch. 184, §5 [1969 McKinney's Session Laws of New York 215, 217], and granting summary judgment for plaintiffs-appellees. (2) Appeal from an order of a three-judge court of the Eastern District of New York, dissolving itself on the ground that the issue for which it was established was moot and that it had before it no new issue then ripe for adjudication.

(1) The injunctions are vacated; the decision granting summary judgment is reversed. (2) The order of the three-judge court is affirmed.

HAYS, *Circuit Judge*:

Defendants-appellants, the New York Commissioner of Social Services and the New York Department of Social Services appeal from an order and a judgment of the United States District Court for the Eastern District of New York granting a preliminary injunction, —— F. Supp. —— (1969), and a permanent injunction, —— F. Supp. —— (1969), against enforcement of Section 131-a of the New York Social Services Law.[1]

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1 Law of March 30, 1969, ch. 184, §5 [1969 McKinney's Session Laws of New York 215, 217].

Subsections 1-3 of Section 131-a provide:

131-a. Maximum monthly grants and allowances of public assistance

1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

(*continued on following page*)

An appeal by plaintiffs-appellees from a related decision of a three-judge court has been consolidated with the appeals referred to in the preceding paragraph.

I.

Plaintiffs-appellees in this class action are welfare recipients residing in New York City and in Nassau County. They receive payments pursuant to the Aid to Families with Dependent Children program (AFDC) of the Social Security Act, 42 U.S.C. §§601-10 (1964, Supp. IV 1965-68). Under this program, in which all states participate, the federal government provides funds to the states on the condition that the plans for use of the funds meet various federal requirements. 42 U.S.C. §602(a) and (b) (1964, Supp. IV 1965-68). The states and their subdivisions also provide funds and each state administers its own program.

Appellees raised two principal claims in their complaint. The first was that Section 131-a violated Section 602(a)(23) of the Social Security Act[2] as amended in 1967 by reducing the amount of the AFDC benefits paid to them. The sec-

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Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$60	$101	$142	$183	$224	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

2 Social Security Amendments of 1967, Pub. L. No. 90-248, §213(b), 81 Stat. 821, 898 (codified in 42 U.S.C. §602(a)(23) (Supp. IV 1965-68)).

ond claim, made by those appellees who are residents of Nassau County, was that Section 131-a violated the equal protection clause of the Fourteenth Amendment by providing for lower payments to AFDC recipients in Nassau County than to those in New York City, although the cost of living is substantially the same in both areas.

A three-judge district court was constituted under 28 U.S.C. §2281 (1964) to hear the constitutional claim.

While the action was pending before the three-judge court, Section 131-a was amended to permit the Commissioner of Social Services to increase scheduled payments for areas outside New York City up to a maximum no higher than the levels for New York City, upon his determination that the total cost of the items included in the schedule for such an area exceeds the amount provided in the schedule.[3] The three-judge court ruled that this amendment mooted the equal protection claim of the Nassau County recipients, by making it possible for their payments to be increased to the level provided for New York City recipients if the cost of living in Nassau County made such an increase appropriate. It concluded that "any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding." The three-judge court also held that the mooting of the constitutional claim made "academic" the question of whether it might have decided the statutory claim in the exercise of its pendent jurisdiction. It then ordered itself dissolved and remanded the case to Judge Weinstein "for such further proceedings as are appropriate." —— F.

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3 Law of May 9, 1969, ch. 411, §1 [1969 McKinney's Session Laws of New York 652-53].

Supp. —— (1969). The same day Judge Weinstein issued an order temporarily restraining action under Section 131-a. Four days later he issued a preliminary injunction and denied appellants' motion to stay the injunction. On May 21 this court granted appellants' motion for a preference for their appeal from the order granting the preliminary injunction and denied appellants' motion for a stay without prejudice to renewal at the argument of the appeal. The appeal was argued on June 4, at which time the motion was renewed, and on June 11 this court stayed the injunction pending the disposition of the appeal. On June 16 this court denied appellees' motion to vacate the stay and denied appellants' motion to stay proceedings in the district court until the decision on the appeal from the preliminary injunction. The next day appellees appealed to the United States Supreme Court from the order of dissolution of the three-judge court. The appeal was accompanied by a petition for certiorari before judgment to this court and a motion to expedite Supreme Court consideration of the case. On June 18, while the appeal was still pending in the Supreme Court, the district court granted summary judgment for appellees and issued a permanent injunction. The same day appellants filed a notice of appeal to this court from the issuance of the permanent injunction. On June 19 this court granted appellants' motion to stay the permanent injunction and it also granted appellants' motion to consolidate the appeal from the permanent injunction with the appeal from the temporary injunction. On June 24 the Supreme Court dismissed for want of jurisdiction the appeal from the dissolution of the three-judge court on the ground that the order was properly appealable to this court. The Supreme Court also refused to grant certiorari before judgment and

denied appellees' motions to expedite review and to vacate the stays ordered by this court. 37 U.S.L.W. 3492. Appellees thereupon appealed to this court from the order dissolving the three-judge court and that appeal was consolidated with the appeals from the injunctions.

II.

We turn first to the issue raised by the appeal from the order of the three-judge court.

Appellees urge that the three-judge court erred in dissolving itself and that we should order it to resume its deliberations.

The court ordered itself dissolved because of the adoption of an amendment to Section 131-a permitting increased payments to AFDC recipients in Nassau County upon a determination by the Commissioner of Social Services that the increases are required in order to reflect actual cost of living. The three-judge court was of the opinion that the issue raised by the Nassau County plaintiffs was mooted by the amendment to Section 131-a and that the issue presented by the amendment itself was not yet ripe for adjudication.

We are persuaded that the court acted correctly. We are confirmed in this view by the fact that, since the dissolution of the three-judge court, the schedule of payments for Nassau County has in fact been increased by reason of the provisions of the amendment to Section 131-a. If corroboration of the opinion of the three-judge court be needed it is provided by this development. Obviously a determination by the court based upon the situation as it existed at the earlier date would have been premature and its decision would have been rendered moot by the provision of the new schedules for Nassau County. The court was right in refusing

to act on facts that were fluid and subject to early change. We affirm its order dissolving itself.

III.

Appellants contend that the single district judge erred in exercising jurisdiction to issue a preliminary and a permanent injunction on the basis of the statutory claim after the constitutional claim had become moot and the three-judge court had dissolved itself.

Pendent Jurisdiction

The three-judge court specifically refused to decide whether it could have exercised pendent jurisdiction to rule on the statutory claim after it had determined that the constitutional claim was moot. —— F. Supp. at —— (1969). In remanding the case to the single district judge for "appropriate" action the court did not decide whether he could exercise such jurisdiction.

The single district judge ruled that it was proper for him to assert pendent jurisdiction over the statutory claim. —— F. Supp. —— (1969). We find this conclusion to have been in error.

The assertion of a constitutional claim required the convening of a three-judge district court. 28 U.S.C. §2281 (1964). That court is the only court which ever had jurisdiction over the constitutional claim. Since the single judge at no time had jurisdiction over the constitutional claim there was never a claim before him to which the statutory claim could have been pendent. If the three-judge court had attempted to give the single judge power to adjudicate the statutory claim, it could not have done so, since with the dissolution of the three-judge court the statutory claim was no longer pendent to any claim at all, much less to any

claim over which the single judge could exercise adjudicatory power.

King v. *Smith*, 392 U.S. 309 (1968) provides no authority for deciding the pendent statutory claim. There the Court said:

> "We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." *Id.* at 312 n. 3.

While the Court in *King* decided a pendent statutory claim, the constitutional claim to which it was pendent remained viable throughout the litigation. The Court exercised jurisdiction over the pendent statutory claim in order to avoid adjudication of the constitutional issue.

Moreover even if we were to accept the overbroad interpretation of the doctrine of pendent jurisdiction urged upon us by appellees, we would hold in the present case that the district judge's exercise of such jurisdiction was an abuse of discretion.

In *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), it is clear that there are circumstances in which the exercise of pendent jurisdiction is inappropriate. We believe that it is inappropriate here, where, whatever the technical consequences of enjoining enforcement of Section 131-a may be, the practical effect of an injunction is to order the New York legislature to appropriate more funds for welfare.

A federal court should not assert such power over a state legislature unless there is no possible alternative. Even if the district judge had had discretion, he should have refused to rule on the statutory claim.

In *King* v. *Smith, supra,* the relief granted, enjoining the application of the Alabama "man in the house" regulation, did not have the effect of requiring the state legislature to appropriate additional funds. By invalidating the state regulation, the court substantially increased the number of eligible aid recipients but it specifically noted that Alabama was "free . . . to determine the level of benefits by the amount of funds it devotes to the program." *Id.* at 318-19 (footnote omitted). See *Lampton* v. *Bonin,* —— F. Supp. —— (E.D. La. 1969) (three-judge court).

The Department of Health, Education and Welfare is now engaged in a study of the relationship between Section 602 (a)(23) and Section 131-a. HEW, with its acknowledged expertise in the field of social security, is far better equipped than the federal courts to review an alleged inconsistency between a complex state statutory scheme for payments in behalf of dependent children and an ambiguous amendment to the Social Security Act. The district court, even if it had power to act on the pendent claim, should have declined to do so, at least until HEW had completed its consideration of the matter.

Section 1331

The district judge also found that he had jurisdiction to decide the statutory claim under 28 U.S.C. §1331 (1964) which provides for jurisdiction over federal questions where "the matter in controversy exceeds the sum or value of $10,000 . . . ."

The district judge properly held that the claims of the members of the class may not be aggregated to satisfy the $10,000 requirement. See *Snyder* v. *Harris,* 37 U.S.L.W. 4262 (U.S. March 25, 1969). He also correctly ruled that "the monetary loss to each of the plaintiffs

does not approach $10,000." —— F. Supp. at ——. But after finding that appellees could not obtain jurisdiction by showing direct damage of $10,000, the district judge decided that the "indirect damage" they might sustain as a result of their reduced payments was sufficient to satisfy the $10,000 requirement. "Indirect damage" is too speculative to create jurisdiction under Section 1331.

> "It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars. The rule was laid down in Barry v. Mercein, 46 U.S. (5 How.) 103, 12 L. Ed. 70 (1847), a child custody case. The 'right to the custody, care, and society' of a child, the court noted, 'is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.' 46 U.S. at 120. Since the statute permitted appeals only in those cases where the 'matter in dispute exceeds the sum or value of two thousand dollars,' the court concluded that it was without jurisdiction:
>
> > 'The words of the act of Congress are plain and unambiguous * * *. There are no words in the law, which by any just interpretation can be held to * * * authorize us to take cognizance of cases to which no test of money value can be applied.' 46 U.S. at 120.

Subsequent decisions have followed this reasoning. See Kurtz v. Moffitt, 115 U.S. 487, 498, 6 S. Ct. 148, 29 L. Ed. 458 (1885); First Nat. Bank of Youngstown v. Hughes, 106 U.S. 523, 1 S. Ct. 489, 27 L. Ed. 268 (1882); Giancana v. Johnson, 335 F. 2d 366 (7th Cir.

1964), cert. denied, 379 U.S. 1001, 85 S. Ct. 718, 13 L. Ed. 702 (1965); Carroll v. Somervell, 116 F. 2d 918 (2d Cir. 1941); United States ex rel. Curtiss v. Haviland, 297 F. 431 (2d Cir. 1924); 1 Moore, Federal Practice ¶0.92[5] (2d ed. 1964)."

Boyd v. *Clark*, 287 F. Supp. 561, 564 (three-judge court, S.D.N.Y. 1968), aff'd on another issue, 393 U.S. 316 (1969) (footnotes omitted).

Section 1343

Appellees argue on two grounds that jurisdiction over the statutory claim exists under 28 U.S.C. §§1343(3) and (4) (1964). Having found that jurisdiction existed under the doctrine of pendent jurisdiction and under Section 1331, the district judge did not rule on this issue.

Sections 1343(3) and (4) provide:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The first contention of appellees is that their claim under the AFDC provisions creates a cause of action under 42 U.S.C. §1983 (1964), for which jurisdiction is conferred by Sections 1343(3) and (4). Section 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaint, properly read, does not allege the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. The burden of the complaint is that New York's statute, Section 131-a, is not in conformity with the requirements of Section 602(a)(23) of the federal statutes and that therefore New York is not entitled to receive federal grants under the AFDC program. Plaintiffs have no rights under federal law to any particular level of AFDC payments or, indeed, to any payments at all. See *New York* v. *Galamison*, 342 F. 2d 255 (2d Cir.), cert. denied, 380 U.S. 977 (1965); *Bradford Audio Corp.* v. *Pious*, 392 F. 2d 67 (2d Cir. 1968).

Moreover, it is clear that the defendant Department of Social Services for the State of New York is not a "person" within the meaning of Section 1983. See *Monroe* v. *Pape*, 365 U.S. 167, 187-92 (1961); *Clark* v. *Washington*, 366 F. 2d 678, 681 (9th Cir. 1966); *Williford* v. *California*, 352 F. 2d 474 (9th Cir. 1965). Since the suit here con-

stitutes an attack on a state statute, and not on action taken under it, the plaintiffs' complaint is against the state and not against the Commissioner as an individual. He too is therefore not within the scope of Section 1983.

Appellees' second contention is that the Social Security Act, which contains the AFDC provisions, is a law providing for "equal rights" so that jurisdiction exists under Section 1343(3) independently of the existence of any claim under the Civil Rights Act. Section 602(a)(23) is not designed to secure "equal rights" for purposes of Section 1343(3).

IV.

Although we are persuaded that the district judge had no power to adjudicate this action, we turn to a brief discussion of the merits, since our decision does not rest solely on jurisdictional grounds.

Under the AFDC provisions in effect prior to the enactment of Section 602(a)(23),[4] the states, in order to receive grants under the federal program, were required to set a standard of need under which recipients qualified for payments but they were not required to pay the full standard and in practice many of them did not. See *King* v. *Smith*, *supra*, 392 U.S. at 318-19, 334. As originally proposed, Section 602(a)(23) would have required each state to pay its full standard of need and to adjust that standard annually in accordance with changes in the cost of living. H.R. 5710, §202, 90th Cong., 1st Sess. (1967). In the statute as finally adopted both the provision requiring the states to pay their full standard of need and the provision requiring an annual cost of living adjustment in that standard were eliminated.

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4 See note 2, *supra*.

Section 602(a)(23) now provides:

"§602(a) A State plan for aid and services to needy families with children must . . .

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

The appellees contend that the mandated cost of living adjustment requires that all states which, prior to the amendment, were paying benefits equal to their full standard of need must continue to pay their full standard adjusted to reflect the cost of living as of July 1, 1969. In effect, they argue that §602(a)(23) sets a floor under state AFDC benefits, freezing them at their previous level plus the cost of living adjustment.

We believe that Section 602(a)(23) was not intended to have anything like this broad a scope. We read it as making two far less dramatic changes in the law. First, it requires each state to make an adjustment in its standard of need by July 1, 1969, to reflect changes in the cost of living, but does not require any state to pay its standard of need, nor to increase its AFDC payments or to refrain from decreasing them. The second change required by the statute was not intended to affect New York at all. It refers to a practice employed in many states, not including New York, of imposing a maximum on the amount of aid a family may receive, regardless of its

size.[5] The statute requires that family maximums of the type imposed by these states are to be adjusted by July 1, 1969, to reflect changes in the cost of living.

Our construction of Section 602(a)(23) finds support in the rejection by Congress of the much more stringent bill originally proposed. That rejection demonstrated an intent not to impose controls on the levels of benefits set by the states. The Congressional action was entirely consistent with the traditional federal policy of granting the states complete freedom in setting the level of benefits. See *King* v. *Smith, supra,* 392 U.S. at 318-19, 334.

The Conference Report on Section 213 of the bill, which contained the version of Section 602(a)(23) that was enacted, indicates the correctness of a narrow interpretation. In discussing the portion of the pre-Conference version of Section 213 that dealt with certain non-AFDC recipients, the Report states that the Section would have required "each state to adjust its standards for determining need, the extent of its aid or assistance, and the maximum amount of the aid or assistance payable," and thus mandated an increase in aid. However, in explaining the portion of Section 213 that, except for a change from an annual cost of living adjustment to a single such adjustment, became Section 602(a)(23), the Report states only that the bill would require each state to "adjust its standards so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid." Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967),

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5 Maine, for example, provides $27 per month for each child after the first but permits a family to receive a monthly grant of no more than $250. See *Westberry* v. *Fisher,* 297 F. Supp. 1109 (D. Me. 1969), where a three-judge district court ruled that the Maine regulation imposing a family maximum violated the equal protection clause of the Fourteenth Amendment. See also *Williams* v. *Dandridge,* 297 F. Supp. 450 (D. Md. 1968, 1969) (three-judge court).

reprinted in [1967] U.S. Code Cong. and Admin. News 3179, 3208-09. The absence of any statement that the portion of Section 213 relating to AFDC payments was intended to effect an adjustment in "the extent of [each state's] aid or assistance" is significant in view of the fact that the immediately preceding discussion of the portion of Section 213 relating to other kinds of assistance refers specifically to such an adjustment in "the extent of . . . aid."

The absence in the legislative history of any support for appellees' interpretation of the statute as imposing a floor on payments is especially significant in view of the long-standing Congressional practice of not imposing such restrictions on the states. As HEW said of Section 602(a)(23) in the brief it submitted in *Lampton* v. *Bonin*, *supra*, "The Congress could hardly have paid less attention to it."[6] It is inconceivable that if this were the far reaching measure serving to reverse a basic national policy which plaintiffs claim it was, it should be adopted without comment from committees and individual members of Congress.

That Section 602(a)(23) was not intended to have the broad effect urged by appellees is further indicated by the fact that it is not even discussed in the "Summary of Social Security Amendments of 1967," a joint publication of the Senate Committee on Finance and the House Committee on Ways and Means, which was prepared for the use of the two committees by the committee staffs. Similarly the "Summary of Principal Provisions" of the Senate bill contained in the Senate Finance Committee report

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6 HEW's brief expresses agreement with our view on the fundamental proposition that Section 602(a)(23) did not mandate increases nor freeze floors, but left the states free to reduce AFDC payments. However the HEW analysis differs from ours in some respects.

makes no mention of the provisions that became Section 602(a)(23). S. Rep. No. 744, 90th Cong., 1st Sess. (1967), reprinted in [1967] U. S. Code Cong. and Admin. News 2834, 2840.

V.

We find that the only obligation imposed on New York by Section 602(a)(23) is that sometime between January 2, 1968, the effective date of Section 602(a)(23), and July 1, 1969, the deadline imposed by the Section, it must adjust its standards of need to reflect the cost of living. The schedules in Section 131-a are based on prices as of May, 1968. Thus New York has complied with Section 602(a)(23).

The two injunctions are vacated and the decision granting summary judgment for appellees is reversed. The order of the three-judge court dissolving itself is affirmed.

LUMBARD, *Chief Judge* (concurring):

I concur in the result.

While I agree with much of Judge Hays' opinion our differences on some issues necessitate this separate statement.

I rest my concurrence on the ground that the district court abused its discretion in rendering judgment on the pendent claim.

The district court, in my view, did have pendent jurisdiction over the statutory claim in the sense of judicial power. The Supreme Court has held that power exists "in the federal courts" to decide a pendent claim when, (1) it is joined to a constitutional claim which is not insubstantial, and, (2) the nature of the pendent and constitutional claims are such that the plaintiff "would

ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Both of these tests are satisfied in this case.

The fact that the three-judge court declared the constitutional claim moot and thereupon dissolved itself, referring the proceedings back to the single judge district court, did not deprive the district court of pendent jurisdiction. Pendent jurisdiction, in the sense of judicial power, attaches at the outset of a suit. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 727 (1966). The subsequent dismissal of the constitutional claim, Gibbs makes clear, does not deprive the federal courts of all power over a properly joined pendent claim. What it does do is to mandate a reassessment by the three-judge court, or by the single district judge upon referral by the court, of the propriety of proceeding further on the pendent claim. The question becomes one of discretion, and not of judicial power in the strict sense. See *id.* at 726-27.

I know of no authority which prohibits a three-judge court, after it has disposed of a constitutional claim, from referring any remaining pendent claims to a single judge for appropriate disposition. A flat prohibition on such references does not recommend itself from the standpoint of judicial convenience and economy, for often a single judge will be able to dispose of the pendent claims more expeditiously than the cumbersome three-judge court machinery. Of course, the three-judge court might well have dismissed the pendent claim, but, for reasons which are not stated, it did not do so.

In any event, the propriety of the single judge's decision concerning whether or not to proceed to judgment on a pendent claim is subject to review for abuse of discretion, and that is the issue I find squarely presented in this case.

There is force to Judge Hays' suggestion that one factor relevant to the exercise of the district court's discretion is the nature of the remedy sought by plaintiffs. Here the remedy was extreme: an injunction against the operation of a welfare program under a state statute. Congress established the three-judge court mechanism to insure that a state statute would not be enjoined on constitutional grounds simply on the decision of a single judge. While a three-judge court is not required when an injunction is sought on statutory grounds, as here, nonetheless the extreme nature of the injunctive remedy against the state weighs heavily against the adjudication of a pendent claim by a single district judge. This is particularly true in a case such as this, where the constitutional claim had been dismissed well before a decision on the merits, and thus there had not been a substantial investment of federal judicial resources in the case as a whole at the time of the reference of the pendent claim to the single judge. Cf. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966), holding that pendent state claims should be dismissed if the constitutional claim is dismissed before trial.

It is true that the pendent claim in this case is founded upon federal law, thus making the exercise of jurisdiction by a federal court less objectionable than if the claim arose under state law. But here, as Judge Hays points out, the federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the courts. The two issues upon a resolution of which this claim turns—the practical effect of §131-a and the proper construction of §602(a)(23) of the Social Security Act—both are exceedingly complex. The briefs and arguments of the parties, and the varying judicial views they have elicited, have demonstrated the wisdom of allowing HEW, with its expertise in the operation of the AFDC program

and its experience in reviewing the very technical provisions of state welfare laws, an initial opportunity to consider whether or not §131-a is in compliance with §602(a)(23).[1] This is HEW's responsibility under the Social Security Act, see 42 U.S.C.A. §1316 (Supp. 1969). I believe that the district court should have declined to exercise its jurisdiction, thus permitting HEW to determine the statutory claim asserted by plaintiffs, for the Department already had initiated review proceedings concerning §131-a. The Department's determination, it should be noted, will be reviewable in the courts at the instance of either the state, under 42 U.S.C. §1316(a)(3) (Supp. 1969), or the plaintiffs under the Administrative Procedure Act.

While I agree with Judge Hays' treatment of the jurisdictional issue raised under 28 U.S.C. §1331, we differ somewhat with respect to the application of 28 U.S.C. §1343(3) and (4). I do not find that the plaintiffs' claim under §602(a)(23) involves the redress of either "equal rights" or a "civil right" as those terms are used in §1343. I do not believe that the claim, although one founded on a federal right, falls within the ambit of 28 U.S.C. §1983, for it lacks the constitutional overtones that have been present in all the welfare cases cited by the plaintiffs which have been sustained under that section. But even if a broad reading of §1983 is accepted it cannot change the nature of the plaintiffs' claim for the purposes of §1343. On its face it is clear that §602(a)(23) has nothing to do with "equal rights," and it also cannot be said to involve a "civil right" in view of the circumstances which gave

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1 In *King* v. *Smith*, 392 U.S. 309 (1968), a case much relied on by plaintiffs, HEW had already given notice to the state that its regulation did not conform to the requirements of federal law. 392 U.S. 326 n. 23. Thus the challenge to the regulation made in the *King* suit was ripe for resolution by the courts.

rise to the enactment of §1343(4) in 1957. See U.S. Code Cong. & Adm. News, 85th Cong. (1957), pp. 1966, 1976, H.R. Rep. No. 291.

Since I do not feel that the federal courts are the appropriate forum for the initial resolution of plaintiffs' statutory claim, I do not reach the merits of that claim. At the same time, I should add that Judge Feinberg's view of the merits does not persuade me.

FEINBERG, *Circuit Judge* (dissenting):

The decision in this case allows the State of New York to receive millions of federally granted dollars and then proceed to ignore the federal law granting them by reducing payments to thousands of welfare recipients already living at a bare subsistence level. This result follows from a restrictive interpretation of the district court's jurisdiction and allowable discretion and of the meaning of the applicable federal statute. I respectfully but emphatically dissent.

Because of the differences in the opinions of my brothers, it is necessary to describe them precisely. As I understand it, they agree that the three-judge court properly dissolved itself. Judge Hays rules that the single judge thereafter had no jurisdiction; Chief Judge Lumbard is of the view that the single judge had the power to decide the case, but agrees with Judge Hays that it was an abuse of discretion to do so. Finally, Judge Hays decides that section 131-a of the New York Social Services Law does not conflict with the 1967 amendment of the Social Security Act referred to as section 602(a)(23). Chief Judge Lumbard does not deal with the merits, although he finds unpersuasive the interpretation of section 602(a)(23) contained in this dissenting opinion. I dissent from the

holdings that the single judge lacked jurisdiction or abused it, and that section 131-a does not conflict with section 602 (a)(23). Discussion of the propriety of dissolution of the three-judge court is deferred to point III below. I turn first to the question of the jurisdiction of Judge Weinstein to grant plaintiffs relief.

I. *Jurisdiction of the single judge.*

On this aspect of the case, the issue is whether the United States District Court for the Eastern District of New York had jurisdiction to determine whether federal funds were about to be spent in a manner that would violate a federal statute. Thus stated, the question begs for resolution in a federal court, rather than in a state forum as appellants contend. Moreover, the formidable intricacies of three-judge court procedure should not be allowed to obscure this basic issue.

The district court judge originally convened a three-judge court on April 24, 1969, plaintiffs' complaint having challenged section 131-a of the New York Social Services Law on two main grounds: first, denial of equal protection of the laws because residents of Nassau County would be discriminated against by new payment schedules below those for residents of New York City, and second, conflict with a federal statute, 42 U.S.C. §602(a)(23). Thereafter, the three-judge court held a hearing. While the issues were before it, the New York State legislature adopted an amendment to section 131-a, which the three-judge court felt rendered the equal protection claim moot. Accordingly, that court dissolved itself on May 12, 1969, and remanded the matter back to the single judge. On May 15, Judge Weinstein issued his opinion and on May 16, his order from which appeal has been taken.

Judge Weinstein's conclusion that he had jurisdiction was based upon two theories: that jurisdiction to decide the federal statutory claim was pendent to the federal constitutional claim and that jurisdiction also existed under 28 U.S.C. §1331. He noted that there might also be independent jurisdiction over the federal statutory claim under 28 U.S.C. §1343(3), but found it unnecessary to decide that question. I agree with the district court judge that pendent jurisdiction existed even though the federal constitutional claim of denial of equal protection had been eliminated from the case. I reach this conclusion by either of two routes.

A. Assume that the jurisdiction exercised over the statutory claim was that of the three-judge court. In *King* v. *Smith,* 392 U.S. 309 (1968), the Supreme Court made clear that when a federal constitutional claim and a federal statutory claim are joined together, the three-judge court has power to decide the latter. In fact, that is what the Supreme Court did, putting aside the constitutional issue. It is true that in footnote 3, the Court said (392 U.S. at 312):

> We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts. See generally Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

However, that referred to a suit brought *only* on the statutory ground, a situation not present in that case or here. Indeed, in *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73, 80-81 (1960), the Court said that a properly convened three-judge court has jurisdiction

"over *all* claims" raised against a state statute. The footnotes in that opinion at pp. 81-82 make clear that the quoted phrase applies not just to claims based upon a federal statute but even to "local questions" arising under a state constitution and to "every question involved, whether of state or federal law." Therefore, if the three-judge court in this case was properly convened, as it said it was, it had the power to decide the statutory claim. It chose not to do so on its theory that the constitutional claim had become moot, stating:

> We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs. Cf. *King* v. *Smith*, 392 U.S. 309, 312 n. 3 (1968). Under the circumstances of this case there is no reason for continuing the three-judge court.

Thus, it is not clear whether the court thought it could or could not exercise pendent jurisdiction, or whether it was deciding that no judge should exercise that jurisdiction or was leaving the question for the single judge. In any event, the matter was remanded back to the single judge "for such further proceedings as are appropriate." Therefore, Judge Weinstein was left with the possibility that the pendent jurisdiction he said that he exercised was that of the three-judge court passed back to him. Cf. *Landry* v. *Daley*, 288 F. Supp. 194 (N.D. Ill. 1968). If he was exercising that jurisdiction, then under the cases cited above his power to do so was clear, unless the moot-

ness of the constitutional claim prevented him, an issue discussed further below.

B. Assume, however, that because the three-judge court had been dissolved the case must be considered on the theory that the pendent jurisdiction allegedly exercised was only that of the single judge district court. Both the constitutional and statutory claims were in the complaint as originally filed. Judge Weinstein convened the three-judge court to consider both but pointed out that if it should subsequently be determined that a three-judge court was not required, "the single judge's decision, as part of that three-judge court, would become the opinion of the Court." When the complaint was filed, the federal constitutional claim of denial of equal protection of the laws was not frivolous and clearly fell within the jurisdictional language of 28 U.S.C. §1343(3), since it sought to redress the deprivation, under color of a state law, of a right secured by the Constitution. The substantive statutory basis for the action was 42 U.S.C. §1983. Insofar as the constitutional claim is concerned, the only reason for a three-judge court was that plaintiffs sought to enjoin the "enforcement, operation or execution" of a state statute. 28 U.S.C. §2281. That did not change the jurisdictional basis; it was a concomitant of the relief sought. At the time the complaint was filed, Judge Weinstein had sufficient "jurisdiction" over the constitutional claim to grant a temporary restraining order, 28 U.S.C. §2284(3), as indeed he did. It is unnecessary to speculate whether in appropriate circumstances the single judge could have, on the basis of the constitutional claim, granted damages against defendant Wyman in an individual capacity[1] or

1 See, e.g., *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Kletschka* v. *Driver*, —— F. 2d —— (2d Cir., April 22, 1969).

issued a declaratory judgment to plaintiffs if they had limited themselves to the two prayers for declaratory relief in the complaint instead of adding another for injunctive relief as well.[2] In fact, plaintiffs took the position before Judge Weinstein that a three-judge court was not required because, *inter alia,* declaratory relief was sought. While Judge Weinstein thought that the request for injunctive relief made a three-judge court necessary, it is not accurate to say that he had no jurisdiction over any aspect of the constitutional claim when the complaint was filed. If such jurisdiction did exist—and I believe that it did—a closely related statutory claim could also be decided by a single judge under the general principles of pendent jurisdiction, liberally construed in *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).[3] Therefore, Judge Weinstein had pendent jurisdiction over the federal statutory claim at the time the case first came before him. It may even be—although it is not necessary to resolve that

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2 That the state statute could be held unconstitutional in a declaratory ruling by the single judge seems settled. See ALI Study of the Division of Jurisdiction Between State and Federal Courts 245 (Tent. Draft No. 6, 1968), recommending that such a declaratory judgment require a three-judge court but noting:

> [T]he requirement is here extended to cases seeking only a declaratory judgment, a remedy which was unknown in 1910. Three judges are not now needed in such a case. Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154-155 (1963); Flemming v. Nestor, 363 U.S. 603, 606-607 (1960).

And see Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 13-20 (1964).

3 The basic and pendent claims "must derive from a common nucleus of operative fact," 383 U.S. at 725, clearly present in this case, e.g., the level of benefits before and after section 131-a and the relationship between benefits and need. The court has power to hear all of the claims if plaintiffs "would ordinarily be expected to try them all in one judicial proceeding," *id.,* assuredly the case here.

issue—that the judge could have acted upon plaintiffs' suggestion that he decide the statutory issue first and convene the three-judge court later, if necessary. Cf. *Kelly* v. *Illinois Bell Telephone Co.*, 325 F. 2d 148 (7th Cir. 1963); *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 (6th Cir. 1958); but cf. *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960). The judge declined that invitation not because he thought he lacked the power to so rule but because he felt that convening the three-judge court would avoid "costly" delay.

The crucial question on either theory A or B is whether the elimination thereafter of the constitutional claim as moot *necessarily* divested the district court of jurisdiction it already had. In *United Mine Workers* v. *Gibbs*, *supra*, the Court did say, 383 U.S. at 726:

> Certainly, if the federal claims are dismissed before trial, even though not unsubstantial in a jurisdictional sense, the state claims should be dismissed as well.

But the Court spoke there in the context of a *federal* against a *state* claim. The point here is that the alternative claim to which pendent jurisdiction attached was not a state claim at all, but a claim based upon a federal statute. Moreover, the dismissal of the constitutional claim here did not occur "before trial" but after Judge Weinstein and the three-judge court had spent days in taking evidence and hearing argument on the motion for an injunction. Indeed, Judge Weinstein issued a preliminary injunction only three days after dissolution of the three-judge court and without any further hearing. Moreover, appellants concede that, in effect, at that point a

full trial had been held.[4] Certainly there have been instances where pendent jurisdiction has been allowed to continue even though the basic federal jurisdictional claim has been denied, see, e.g., *Hurn* v. *Oursler,* 289 U.S. 238 (1933); *United Mine Workers* v. *Meadow Creek Coal Co.,* 263 F. 2d 52, 59-60 (6th Cir.), cert. denied, 359 U.S. 1013 (1959); *Travers* v. *Patton, supra,* 261 F. Supp. at 116; cf. *Murphy* v. *Kodz,* 351 F. 2d 163 (9th Cir. 1965), or mooted. *Hazel Bishop, Inc.* v. *Perfemme, Inc.,* 314 F. 2d 399 (2d Cir. 1963).

The reasons Judge Weinstein gave for retention of jurisdiction were as follows:

> The pendent claim does not involve state law alone, but poses crucial and important questions of federal statutory law. It vitally affects a national program designated to protect the fundamental rights of children to the sustenance and stable family life which will enable them to develop into full members of our society capable of exercising their rights and responsibilities under the United States Constitution and it involves the expenditure of billions of dollars of federal monies. The courts in the federal system are in at least as good a position as state courts to adjudicate this question of federal law. Nor can this be described as a petty or unimportant controversy of the kind Congress sought to exclude from the federal courts.
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4 See Appellants' Application for a Stay of Further Proceedings in the District Court, June 13, 1969, at 2:

> The extraordinarily broad nature of the preliminary injunction in this case and the opinion of the Court below which supported it is such that every real issue in the case had been decided by the District Court and is presently before this Court.

A speedy determination of this litigation is highly desirable. From the point of view of the plaintiffs, an unnecessary reduction of their benefits may reduce their income below subsistence level, causing grievous harm. From the state's vantage point, an unnecessary extension of any temporary restraining order preventing institution of the new reduced benefits would, according to the testimony of a Deputy Commissioner in the State Department of Social Services, result in a loss to the state of up to ten million dollars a month. Dismissal, under the abstention doctrine, would require plaintiffs to commence a new suit in the state courts. Resulting loss of time would make it impossible to decide the issues before administrative arrangements must be made to implement the new state statute by its effective date—July 1, 1969.

Furthermore, the parties have already presented substantial testimony, affidavits and briefs to the Court. The expenditure of time by the litigants and the Court would be, to a large extent, wasted were all these materials to be offered anew in a state court.

These were compelling considerations. Whether pendent jurisdiction exists depends in part upon the same reasons which justify its exercise. On these facts, jurisdiction was justified by the saving of judicial time once the case had gone as far as it had, by concern for fairness to the litigants, and by the appropriateness of having a *federal* court decide the issue whether congressional conditions to receipt of *federal* funds are met. See Note, *UMW* v. *Gibbs* and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 664-71 (1968). It should also be noted that a three-judge court in Texas, faced with a similar issue, has apparently just ruled for plaintiffs in that action on the basis of the same federal statute

involved here, while also denying various federal constitutional claims. *Jefferson* v. *Hackney,* Civil Nos. 3-3012-B, 3-3126-B (N.D. Texas, July 1, 1969) (opinion to follow judgment).

Various other arguments regarding the exercise of discretion by the district court remain to be answered. The contention is made that the pendency of an administrative proceeding by the Secretary of Health, Education and Welfare made the district court action "premature" or inappropriate. That "proceeding" was apparently pending in April, and we are not favored with any indication of HEW action other than its request to New York State for further information. The delays inherent in HEW review and the difficulty of obtaining effective exercise by HEW of any sanction were obvious in *King* v. *Smith,* 392 U.S. 309, 326 n. 23 (1968), in which the Court professed no qualms over deciding the issue of construction of the Social Security Act then before it, although HEW had not acted definitively. Cf. *Damico* v. *California,* 389 U.S. 416 (1967); Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 91-92 (1967). In view of the overpowering justification for Judge Weinstein's exercise of discretion to decide the statutory issue, I would not regard the speculative possibility of HEW action as a ground for reversal. If plaintiffs are correct on the merits, as I believe them to be, they will continue to suffer severe and possibly irreparable injury for an indeterminate length of time while HEW studies the problem and negotiates with the state. At the very least, therefore, even under the point of view of the majority, the court should exercise its jurisdiction to the extent of enjoining the operation of the New York statute pending completion of HEW proceedings.

Nor do I agree with the suggestion that the action of the district court was improper because it in effect ordered the state to appropriate additional funds. The district court's holding merely establishes that New York must meet the federal conditions requisite to participation in the federal program or cease its participation. Such a ruling is neither improper nor unprecedented. Thus, a number of courts have recently determined that state maximums on the amount of aid to AFDC families were invalid as violating the equal protection clause or the Social Security Act or both. In at least two of these cases the courts took pains to point out that they were not affirmatively ordering the respective states to appropriate additional funds but only holding that if the states had appropriated insufficient funds to meet the total need they could not "correct the imbalance" by applying the invalid maximums. *Dews* v. *Henry*, 297 F. Supp. 587, 592 (D. Ariz. 1969); *Williams* v. *Dandridge*, 297 F. Supp. 450, 459 (D. Md. 1968); cf. *Westberry* v. *Fisher*, 297 F. Supp. 1109, 1116 (D. Maine 1969). The majority opinion distinguishes *King* v. *Smith*, *supra*, because it "did not have the effect of requiring the state legislature to appropriate additional funds." It is true that the Court there emphasized the latitude of a state in setting "its own standard of need and . . . level of benefits," 392 U.S. at 318, but the effect of section 602(a)(23) was not involved in that case. Moreover, I do not believe that either *King* v. *Smith* or *Shapiro* v. *Thompson*, 37 U.S. L.W. 4333 (U.S. April 21, 1969), which deals with residency requirements, would have been decided differently even if it had been assumed—and the assumption seems logical—that the rulings would increase the expense to a state. In the latter decision, the Court noted that "appellants must do more than show that denying welfare benefits to new

residents saves money. The saving of welfare costs cannot be an independent ground for an invidious classification." *Id.* at 4337 (footnote omitted). In any event, were it necessary, we could follow the example of the three-judge court judgment in *Jefferson* v. *Hackney,* discussed above, which stayed the injunction of the invalid Texas statute for 60 days in order to give the state an opportunity to implement a plan conforming to the requirements of the federal statute. While it may be likely that New York would in fact decide to appropriate additional funds rather than to take some other course of action, that probability is not equivalent to the judicial usurpation of state legislative functions.

Finally, the point is made that a single judge somehow abuses his discretion by enjoining a state statute on the ground that it conflicts with a federal statute. If all that is meant is that it would have been better for three judges rather than one to have ruled on the statutory claim in this case, I agree. The three-judge court had that claim before it and should have decided it rather than dissolving. See point III below. However, if the point is that the single judge in granting injunctive relief thereafter abused his discretion merely because he was a single judge, I disagree. Congress has made the decision not to *require* three judges when the claim for injunctive relief is based on a federal statute rather than on the Constitution. *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965). Whatever may be the merits of a contrary point of view—see Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 55-64 (1964)—the change should now come from Congress.

Thus, I conclude that Judge Weinstein had pendent jurisdiction over the statutory claim whether that jurisdiction be of the three-judge court or a single judge court.

Jurisdiction was not lost because the constitutional claim became moot. The judge did not abuse his discretion by deciding the statutory claim on the merits. On this theory, it is not necessary to decide whether, as appellees contend, there would be jurisdiction under 28 U.S.C. §1343(3) or (4) over a case brought on the statutory claim alone. See Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 111-15 (1967). Finally, it is equally unnecessary to decide whether Judge Weinstein was correct in holding that there was jurisdiction under 28 U.S.C. §1331.

Under the rulings of my brothers, the procedural labyrinth of the three-judge court has swallowed up a substantial claim that thousands of AFDC recipients in New York State will be greatly harmed by the violation of a federal statute. The United States District Court for the Eastern District of New York originally had jurisdiction over that claim. Thereafter, the three-judge court was properly convened, according to its own statement, and continued to have that jurisdiction. That court never denied that it could exercise such jurisdiction and did not reject it. Yet, the jurisdiction which both the single judge court and then the three-judge court had has now somehow magically disappeared or is inappropriate for exercise. I dissent from this grudging assessment of the jurisdiction and discretion of the district court.

II. *Legality of section 131-a.*

Since Judge Hays not only holds that the district court lacked jurisdiction to determine the substantive issues raised in the case before us, but also expresses his views on the merits, I will set forth my reasons for dissenting on that issue as well. This requires an analysis of the

interaction of the federal statute, section 602(a)(23), and the New York statute, section 131-a.

Basic to analysis of the fundamental clash between the two statutes is an understanding of how the program of Federal Aid to Families with Dependent Children (AFDC) operates. The AFDC program is over 30 years old and no state is required to participate in it. But all do and receive payments from the federal government in varying amounts on a matching fund basis. Thus, in New York, 50 per cent of all funds paid to "needy dependent children and the parents or relations with whom they are living," 42 U.S.C. §601, is provided by the federal government. Clearly, then, there is an overwhelming federal interest in the administration of the AFDC program in New York, since the state and the federal government pay for it equally.[5] While administration of the AFDC program is left to the individual states, each state's plan for payments must be approved by the federal government and must meet the requirements of the Social Security Act, 42 U.S.C. §602.

To take advantage of federal AFDC payments, each state must set forth a standard of need and provide a level of benefits based upon this standard. 45 C.F.R. §233.20(a)(2)(i), 34 Fed. Reg. 1394 (1969). The standard of need is determined by adding together the cost of those items deemed necessary for subsistence. As might be expected, both the standard of need and the benefits actually paid vary in content and amount. As to the former, judgments vary in the several states as to what items are necessary for subsistence and what they cost. As to the latter, some states pay 100 per cent of what is defined

5 Actually, the state's direct monetary interest is even smaller, as local governments provide a substantial portion of the non-federal funds.

as the standard of need,[6] while others pay an amount which is less than the standard of need, either by fixing benefits at a percentage of that standard, or by imposing a flat maximum on the amount of benefits to a family. New York has paid 100 per cent of the standard of need, as it defines it, and still purports to follow that course.

It is against this background that we must assess the effect of congressional enactment in 1967 of section 602(a)(23), which requires of each state's AFDC plan that it:

> provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

The critical flaw in appellants' arguments is that they unavoidably require accepting the proposition that in enacting section 602(a)(23) Congress was engaging in a virtually meaningless exercise of ineffectual verbiage. Simply stated, under the proffered interpretation of this legislation, if at some time between January 2, 1968, the date the section became law, and July 1, 1969, a state has complied with the statute's direction that

> the amount used by the State to determine the needs of individuals will have been adjusted to reflect fully

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6 In determining the amount of aid to be paid to a particular individual or family the state may, of course, take into consideration other income or resources of the recipient. See 42 U.S.C. §602(a)(7), (8).

> changes in living costs . . . and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted

the state has at once fully satisfied the congressional requirement and is thereafter free promptly to nullify the adjustment and reduce its AFDC payments back to their original levels or, as in the case of New York State, to substantially lower levels. This hypothesis, inherent in appellants' position, makes a mockery of congressional purpose.

It may be useful to summarize just what the State of New York has done. In August 1968, the Department of Social Services, pursuant to its usual practice, adjusted its standard of need to reflect the rise in the cost of living as determined by a survey it had previously conducted. Even if this initial increase was sufficient "to reflect fully" cost of living changes, however, any attempt at compliance with section 602(a)(23) was vitiated by the passage thereafter of section 131-a of the New York Social Services Law. That section not only wipes out the modest increases of August 1968, but effects additional and very substantial reductions in welfare benefits to the great majority of AFDC recipients. First, the amounts of the regular, recurring payments to families of specific sizes for their fundamental needs are no longer related to the actual age of the oldest child in each family but are standardized sums based on a mean age of the oldest child in all recipient families of that size, an adjustment which results in sharp reductions in regular grants to many families with older children. In addition, "flat grants" to cover major expenditures for clothing and home furnishings are substantially abolished and almost all previously existing "special grants" to cover extraordinary individual needs such as

medically-dictated special diets, maternity expenses, homemaker services, and the like are eliminated.

The district judge concluded that the actual impact of these changes was "substantial." For example, he found that the new law was "a subterfuge to enact drastic cuts in both the standard of need and level of payment"; that in New York City the net effect of the law will result in increases in assistance to 245 families and decreases to approximately 173,900 families; and that "the decrease in total AFDC payments under the New York State program is no less than $75,000,000" annually. On the evidence before the district court, these findings were justified and were surely not "clearly erroneous." Indeed, my brothers do not challenge them. While appellants originally took the position before us that there was no real reduction in the standard of need, no amount of linguistic acrobatics or technical rationalizations can disguise the glaring fact that the state is critically reducing AFDC standard of need and payments. The crucial question is whether doing so violates a congressional directive contained in section 602(a)(23).

Before consideration of that issue it is helpful again to focus on the basic concepts here involved. There are a number of hypothetical ways for a state to affect welfare payments. It can raise or reduce its standard of need, concluding that a greater or lesser sum is sufficient for subsistence. Whether it pays as benefits 100 per cent, or some lesser percentage, of that standard of need, a change in the standard changes the actual payments. A state can also keep its standard of need constant, but change the percentage of that standard which it will pay. Or a state can leave both its standard of need and level of benefits intact in theory, but impose a flat dollar maximum on the amount

going to any one family or adjust the amount of an existing maximum. Section 602(a)(23) refers to changes in "amounts used . . . to determine . . . needs" or in "maximums . . . on the amount of aid paid"; it does not specifically refer to a change in the percentage of the standard of need that a state pays.

I come now to the question of what section 602(a)(23) was designed to accomplish. The language clearly calls for an increase in standards of need and in dollar maximums to take account of an increase in the cost of living of which Congress, like the rest of us, was clearly aware. Ordinarily, an increase in either would cause an increase in money benefits paid out by the state. However, this effect could immediately be negated by any of the devices described above, i.e., by then reducing the standard of need after having increased it, or by reducing the percentage of benefits paid, or by reducing dollar maximums. New York has utilized the first technique and appellants would attribute to Congress the intention of requiring an increase in the standard of need but not caring whether it is thereafter promptly reduced. Even the brief of the United States Department of Health, Education and Welfare, relied on in footnote 6 of the opinion of Judge Hays, appears to balk at such outright nullification of section 602(a)(23).[7]

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7 Thus, the brief notes:

> If a State last priced its assistance standard several years ago, and now is simplifying its standard as well as repricing it, question may arise whether the content of the new standard is equivalent to that of the old, and whether the elimination of items or the combination of items in the standard results in a contraction in the content of the standard that offsets in whole or in part the adjustment of prices to reflect changes in living cost. The second sentence of the regulation seeks to foreclose this possibility

Appellants' position attributes to Congress an intention to appear as though it were accomplishing a result which it knew was not being achieved. I am reluctant to presume that to be the case. The language of section 602(a)(23) means *something*, it certainly calls for an increase in standard of need, thereby suggesting an increase in benefits, and I do not see why it also simultaneously suggests its own nullification. The legislative history relied on by Judge Hays is inconclusive. It shows that the administration bill originally sought a greater increase in benefits (a requirement that all states pay 100 per cent of need) and an annual cost of living adjustment. That something less emerged does not prove that nothing at all was done; if anything, it tends to show the reverse. Appellants argue that Congress could not have enacted even a temporary "floor" on benefits with so little discussion. But undoubtedly such instances have occurred before. While of some weight, the absence of discussion can hardly be controlling. In his opinion granting the preliminary injunction Judge Weinstein painstakingly outlined the progress of section 602(a)(23) through Congress in reaching his determination as to the congressional purpose behind it. He noted that the inadequacy of present welfare payments throughout the states was repeatedly stressed as the motivation for the proposed legislation, and that although additional provisions originally proposed with the section were dropped, the wording of the basic requirements of section 602(a)

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and to assure that the repricing will apply to at least the same scope of items as the previous pricing before January 2, 1968.

* * * * *

To adjust maximums on the one hand and to reduce them on the other would be an outright nullification of, and failure to comply with, the requirements of section 402(a)(23) [section 602(a)(23)], and would not constitute compliance with that section.

(23), and presumably the purpose behind it, emerged virtually unchanged.[8]

Section 602(a)(23) is now the subject of litigation in a number of courts. Prior to this case, the only other federal judge who has undertaken an analysis of the section concluded that it prevented a cut in benefits. In *Lampton* v. *Bonin*, —— F. Supp. —— (E.D. La. 1969), a three-judge court was convened to determine the validity of a ten per cent reduction in AFDC grants by the Louisiana Department of Welfare, which plaintiff recipients attacked on a number of grounds, among them that the reduction violated section 602(a)(23). In a decision rendered in April 1969, two of the three judges held that the question was premature, since the state had until July 1, 1969 to comply with the statute. —— F. Supp. at ——. In a lengthy dissent, Cassibry, *J.*, did reach the merits of the issue, and concluded that the section prohibited any reduction in benefits even before July 1.

> Congress necessarily intended to maintain at least the status quo by setting a floor below which ADC payments could not be reduced, which is certainly the level of ADC payments on January 2, 1968, the base figure from which the increases required by section 402(a)(23) [section 602(a)(23)] are to be determined. Though this prohibition on reductions is not expressly stated in the statute, it is necessarily implied, for any other conclusion is "plainly at variance with the policy of the legislation as a whole."
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> ADC payments in all states are predicated upon the need standard; if this standard is increased, as section

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8 See *Rosado* v. *Wyman*, —— F. Supp. ——, ——·—— (E.D.N.Y. 1969). See also note 9, *infra*.

402(a)(23) requires, the budgetary deficit must also increase accordingly. In those states paying the budgetary deficit in full, as well as in those states that pay only a percentage of the budgetary deficit (or the standard of need), section 402(a)(23) necessarily requires increased ADC grants correspondent to the increase in the standard of need, for a percentage maximum (100 percent or less) kept constant automatically translates increased need into an increased payment. Similarly, in those states imposing an arbitrary dollar maximum on the size of the assistance grant, section 402(a)(23), by requiring that the maximums imposed be adjusted in accordance with the change in the cost of living, insures increased grants for all recipients. Regardless of which system of computing ADC payments the state follows, section 402(a)(23) is therefore designed to effectuate increased ADC recipient grants. The language of the statute could not be any clearer. —— F. Supp. at ——.[9]

More recently, a three-judge court in Texas considered the issue whether a cut in AFDC benefits violated section 602(a)(23). Although the opinion of the court has not yet issued, its judgment has; the latter indicates that the court unanimously concluded that a reduction in benefits violates the federal statute. *Jefferson* v. *Hackney*, Civil Nos. 3-3012-B, 3-3126-B (N.D. Texas, July 1, 1969).[10]

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9 The dissenting opinion also carefully analyzed the legislative history of section 602(a)(23) and concluded, as did Judge Weinstein, that though not voluminous the history of the section clearly evinced a congressional intent that state AFDC payments be increased. —— F. Supp. at ——.

10 See also *Williams* v. *Dandridge*, 297 F. Supp. 450, 464 (D. Md., 1968), where the three-judge court noted in dictum:

> As it shows on its face, §213(b) [section 602(a)(23)] was designed to increase benefits to keep pace with increased living costs.

In both cases, the statutory issues were whether Congress intended by section 602(a)(23) to put at least some floor under welfare payments, and whether the state statute ran counter to that intention. In neither instance did the state legislation reduce a standard of need; rather, the mechanism used to lower benefits was primarily a reduction in the percentage of payment applicable to that standard.[11] Even though that legislative device is not mentioned at all in section 602(a)(23), both Judge Cassibry and apparently the Texas court felt that the federal statute prevented indirect as well as direct evasions of congressional intent. In this case, the action of the State of New York is in even sharper conflict with section 602(a)(23) because, according to the trier of fact, New York has done the one thing that the section is undeniably designed to prevent; i.e., the State has directly reduced the standard of need despite the admonition of the section to adjust that standard "to reflect fully changes in living costs." Indeed, New York has reduced the standard—and therefore the benefits paid—to a level below the standard in effect for most recipients before any cost of living adjustment.

I do not suggest that the meaning and effect of section 602(a)(23) are unmistakably clear. But, on balance, I think that its language and the legislative history relied on by Judge Weinstein show that Congress intended AFDC payments throughout the country to be increased somewhat to reflect the rise in the cost of living and that the levels of payments so adjusted were to remain stationary

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11 Apparently both Louisiana and Texas formerly paid on a basis of 100% of their standards of need, subject to dollar maximums on the amount of aid to any family. After increasing its standards to comply with section 602(a)(23), Texas evidently reduced its percentage payment to 50%; Louisiana merely cut all grants by 10%, including those grants based on dollar maximums. See *Lampton* v. *Bonin*, *supra*, —— F. Supp. at ——, —— & n. 16.

at least pending further congressional action. That this intention was far from unreasonable is sufficiently demonstrated by the fact, supported by ample evidence on the record below, that even in New York State, which has one of the highest levels of AFDC benefits in the United States, AFDC recipients live at or below a bare subsistence level. Accordingly, I conclude that since New York has not complied with section 602(a)(23) properly read, the injunction was justified.

III. *Dissolution of the three-judge court.*

The last issue concerns the appeal from dissolution of the three-judge court. I think that there is a very substantial question as to whether the court was correct in holding that the amendment to section 131-a rendered plaintiffs' constitutional claim either "moot" or "unripe." Plaintiffs very persuasively argue that the only effect of the amendment was to grant purely discretionary administrative power to increase the level of Nassau County payments and that the mere possibility that such discretion might be exercised to cure an allegedly prohibited discrimination is far from sufficient to void the constitutional issue. Nor is it at all clear that the subsequent increase of the Nassau County payment schedules retrospectively corroborates the dissolution of the three-judge court, since plaintiffs assert—and defendants do not deny—that the increase still fails to bring Nassau County levels of payment up to those in New York City. Cf. the recent convening of a three-judge court in *Rothstein* v. *Wyman*, No. 69 Civ. 2763 (S.D.N.Y., July 7, 1969).

Moreover, my view is that the three-judge court should have decided the statutory question which concededly remained in the case before it. All of the reasons referred to

in Part I of this opinion for the exercise of pendent jurisdiction by Judge Weinstein alone applied to the three-judge court. In addition, dissolution of the court allowed the argument to be made—and to be accepted—that the jurisdiction of the three-judge court had disappeared. It would have been quicker, simpler and more appropriate to the kind of pressing issues before that court if it had exercised its power to the fullest.

If I thought that the dissolution of the three-judge court completely divested Judge Weinstein of all jurisdiction then I would regard the decision to dissolve as an abuse of discretion and would dissent on that ground too. However, as Part I, *supra,* indicates, I do not attach that consequence to dissolution and, accordingly, need not go that far.

DD. Judgment of Court of Appeals for the Second Circuit (Document No. 68 [Court of Appeals])

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of July one thousand nine hundred and sixty-nine.

Present:

Hon. J. Edward Lumbard, Chief Judge,

Hon. Paul R. Hays,

Hon. Wilfred Feinberg,

Circuit Judges

Julia Rosado, Lydia Hernandez, Marjorie Miley, Sophia Abron Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Marjorie Duffy, individually and on behalf of their minor children, and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

v.

George K. Wyman, individually and in his capacity as Commissioner of Social Services for the State of New York, and the Dept. of Social Services for the State of New York,

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is granting summary judgment for the appellees be and it hereby is reversed.

It is further ordered, adjudged and decreed that the orders of said District Court granting preliminary and permanent injunctions be and they hereby are vacated and that the order of the three-judge court dissolving itself be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellees.

/s/ A. Daniel Fusaro
Clerk

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EE. Oral Argument of Lee A. Albert on Respondents' Motion to Convene A three-Judge Court on April 18, 1969 Before Judge Weinstein (Document No. 59)

[At Page 104]

[104] MR. ALBERT: If I may continue where I left off, your Honor, on the question of a three-Judge Court, the only claim that conceivably [105] could require a three Judge Court in this case that is even arguable is of course the equal protection claim brought by the Plaintiffs from Nassau County.

It is beyond peradventure that alone a supremacy clause Federal statutory claim does not require a three-Judge Court, and that's been firmly decided by the Supreme Court.

The questions raised by the equal protection claim in regard to the three-Judge Court are twofold: the first is the nature of the relief that is being sought. It is not an insubstantial question in terms of whether a three-Judge Court must be convened where a declaratory relief only is asked for on a Constitutional claim. The history of the statute makes very clear that what was certainly at the heart of the provision requiring three-Judge Courts was a notion of comity based upon the peculiarly abrasive effect of a single Judge enjoining a high state official from doing certain acts, and therefore putting him under the power of contempt for doing those acts.

The Court, recognizing to be sure this [106] purpose, as well as the severe disruption in the Federal Court system of convening three-Judge Courts, as well as the effect on the Supreme Court's own crowded Appellate Document by three-Judge Court cases, has quite strictly and narrowly construed the three-Judge Court requirement. It is indeed stated often on many occasions, including recently, that it is a technical requirement, not a measure of broad social policy, and is to be utilized accordingly.

We are sure the Court has not ignored the mandate of the statute but has applied it with the thought in mind of the functions of that statute as to what it was to prevent. Looking at decisions of the Supreme Court dealing with this very question of a declaratory judgment, there aren't many—the ones there are are all in one direction. Flemming against Nestor was a Constitutional challenge to a provision of the Social Security Act, and a substantial challenge. The Court held in that case that it was to be heard by a one-Judge Court, and one of the reasons, the main reason, [107] was that the relief sought was a declaratory judgment. It reaffirmed that holding in more detail in Kennedy v. Mendoza-Martinez, a challenge to the Immigration and Naturalization Act, or the expatriation provision.

It is true, your Honor, that in many cases declaratory relief will have the same effect as an injunction on a state officer who will voluntarily abide by such a declaration. Nonetheless prayers for declaratory relief on both pragmatic and theoretical grounds are quite distinct from prayers for injunctive relief.

THE COURT: Well, you have asked for such other relief as may be proper. I take it I could grant equitable relief in addition to a declaratory judgment under your complaint.

MR. ALBERT: Were it to be warranted, to be sure.

I don't understand the argument as to why the declaration itself would not be sufficient. One would have to find first that there is substantial likelihood of non-compliance of immediate harm on the equal protection claim [108]

that requires preliminary relief. We have left that out, your Honor, let us be very candid about that, because we did not want that claim to impede the progress of the more fully dispositive single legal issue, to wit, the 402 (a) (23) claim. That's the reason for the division, and our entire reason for it.

It's plain that the statutory–

THE COURT: But that sometimes may result in a longer delay because if it shouldn't be a one-Judge Court then it has to go up to the Court of Appeals, and then maybe to the Supreme Court, and they may say, "Well, you should have had it as a three-Judge Court." And then it comes back and starts all over again.

MR. ALBERT: I think, your Honor–

THE COURT: In King v. Smith, in effect they were saying, I take it–or you could read the opinion that way –that although a one-Judge Court could have done it, since there was a valid three-Judge Court basis it was all right to go ahead that way, and they would affirm on a one-Judge Court ground.

[109] I don't know whether you save any time by taking a short cut.

MR. ALBERT: Judge Weinstein, the problem–we fully appreciate the dangers involved in an uncertain three-Judge Court issue in not having a three-Judge Court. But let us recognize also there are very substantial dangers involved– perhaps of an equal sort– with a very vexed three-Judge Court issues in having one, which is another reason why I think we have limited ourselves to declaratory relief.

If a single Judge in convening is wrong, one, the issue is of course relitigated before the three-Judge Court. It becomes jurisdictional, as well as all the other jurisdictional issues in this very case are relitigable before the three-Judge Court.

Given the fact that the three-Judge Court is going to be asked to hear first and alone the 402 (a) (23) claim, the

issue of whether it should or not must be faced by it. It is possible that the three-Judge tribunal could decide otherwise, and we would be starting again.

[110] If they do not and they hear the 402 (a) (23) claim, at that point we are faced with the problem of whether that tribunal was proper, which means we must file multiple appeals, with all the difficulties that entails.

If the three-Judge Court turns out to be erroneous, then we are back to square one from a decision of the Supreme Court or the Court of Appeals.

So that the alternative choices faced by Plaintiffs I don't think wholly differ.

THE COURT: Well, if the three-Judge Court shouldn't have been convened, doesn't the one-Judge decision remain valid?

I remember there is some question about that, but isn't there some support for that?

MR. ALBERT: If the three-Judge Court is unanimous.

THE COURT: Yes.

MR. ALBERT: If it's unanimous, then that decision— the one Judge who joined in it, whether or not he wrote it or not is irrelevant, it's quite true— would be standing. It's still [111] an open question, and you would have multiple appeals.

THE COURT: You will go to both Courts?

MR. ALBERT: Both Courts. However, the uncertainty arises where that panel is not unanimous. There the issue becomes somewhat more complex.

Is the 2-1 District Court a District Court in the same sense as a one-Judge Court would be? And that hasn't been decided at all.

But we think that the case law makes more than sufficiently dubious the convening of the three-Judge Court in this case. Kennedy-Mendoza dealt with the issue of a

three-Judge Court quite expressly and said in this case, and indeed in broader language than that—the declaratory relief does not warrant the convening of a three-Judge Court. And that was a challenge to a Federal statute on nationwide applicability.

One of the explanations for it was the possibility of vexatious litigation, repetitious litigation, for some shopping for a Judge who might hold in your favor, which was not present [112] there, and two, the relief was limited in scope to this particular party. Both of these features are here.

The Nassau County Plaintiffs—that's a class action, they can't bring another action. Two, the relief is indeed limited which then provides a bridge to the second and more serious, probably, problem in convening a three-Judge Court in this case, and that is the notion of state-wideness.

The line of Supreme Court decisions states very clearly that regardless of whether it is a state statute or a local statute, whether it is a state officer or a local officer is not determinative at all. Those are formalisms.

What is important is whether the acts sought to be enjoined are to be carried on throughout the state and whether the impact of the relief you ask for is to be statewide or not.

There are state statutes in many of the cases in which the Court expressly held that the impact was local and no three-Judge Court was proper, such as Prince Edward County, the school segregation case.

[113] If one looks to the Nassau County Equal Protection claim, by its very premises, the Acts sought to be enjoined are in Nassau County. That's the subject class. But more importantly and fundamentally, by the very premises of the equal protection claim the relief could not extend beyond the Greater New York City metropolitan area.

The claim is—and I'd like to reach that, some points about our Constitutional right to welfare—the basic claim

is that in respect to need people in Nassau County and New York City stand in the same position. No other legitimate state purpose—saving resources arbitrarily is not a legitimate state purpose in this structure—provides justification therefore for creating differentials in the amounts granted to meet the same needs. That's the claim.

Our proof on that claim, our general proof will deal with cost-of-living studies of the New York City metropolitan area provided by the Department of Labor, for example.

[114] Our specific proof will deal with Nassau County and nothing else. The declaration or an injunction cannot extend—cannot tell Commissioner Wyman to do anything more than not apply those differentials shown to be invidious because need is equal to those persons within the areas in which need is equal. And that means Nassau County.

There is not an authority, your Honor, which in that situation would not deem that to be a local claim. The greater metropolitan area or Nassau County are but subdivisions of New York State.

It is by no means conceivable how that can be deemed to be a statewide claim. The fact that it's in a state statute, the fact that it's a state official is just not controlling, and the cases make that very clear. And we are dealing with cases of the highest authority.

Hence, it seems to us there are enormous, grave doubts that a three-Judge Court should be convened to hear that equal protection claim. And there is no other claim to hear.

[115] Let us for the moment proceed to assume that your Honor decides that a three-Judge Court should hear that equal protection claim. I should say in an aside that Mr. Weinberg has argued that the impact of the relief in this case would be enormous. That may be true on the 402(a) 23 claim. That is statewide in any sense of that term. But that is quite irrelevant to the three-Judge situation.

A three-Judge Court convened to hear that claim for that reason alone would plainly be improper. Assuming now that the equal protection claim required a three-Judge Court, the next question is—the next question we proceed to face is whether that three-Judge Court should be convened before a decision of the dispositive 402 statutory claim and that a three-Judge Court should hear that 402(a) 23 claim. We are of the view that we would like this Court to hear that claim to avoid the delay incident to a three-Judge Court, to preclude the necessity of relitigating jurisdictional issues and the possibility of returning to a one-Judge Court should your [116] Honor be overruled, and to obtain an expeditious determination of the 402(a) 23 dispositive claim.

THE COURT: Now, could I decide that question and issue a separate judgment which would be seperably appealable without holding the case until the rest of the claim was decided?

MR. ALBERT: I think your Honor certainly could, but I don't know that that would be necessary because we believe that this is a dispositive claim, because we believe that this is a very strong one, we are moving this one as best we can in a motion for a preliminary injunction. We are making no motions in regard to the equal protection claim for now because it has to be in the course of decision that this 402(a) 23 claim precedes decision on the Constitutional issue, because it avoids the unnecessary resolution of such issue.

THE COURT: Then I take it you would want your preliminary injunction on that with the thought then that that would be appealable, [117] while I would hold the rest of the case here for later determination.

MR. ALBERT: I think the answer to that is clear: Were your Honor to rule for us on the 402(a) 23 claim, that would be the end of the case, that would be dispositive of the case. And the whole case would be appealed. I mean there would be nothing to appeal on the equal protection

claim, nothing was done on it, but I mean the case, the claims as joined, would go up.

THE COURT: I just wouldn't reach the other point in the case, the other claims that you had. I would just decide—grant a judgment for you, which the State would then appeal, as being dispositive of the whole case.

MR. ALBERT: Correct. But it would, because there is nothing further to say about differentials between the reduced levels in Nassau and New York if the entire schedule for both areas and the rest of the State is invalid. So there is nothing left of the case after that.

The injunction would run against the [118] entire amended Act.

THE COURT: Then if I decided against you on that claim, you would want me, I take it—no, you say I still wouldn't have to have a three-Judge Court.

MR. ALBERT: For the reasons—

THE COURT: That only Nassau would be involved?

MR. ALBERT: (Continuing): That this argument—that's correct. This whole argument, your Honor, doesn't arise unless you assume first that the equal protection claim requires a three—judge Court. You have to resolve that first.

If you resolve that it doesn't, then none of these considerations pertain. They only pertain when you say it does.

And at that point this question then comes up: Were you to rule against us on those claims, you would then determine that the equal protection claim was substantial, in the sense of the three-Judge Court substantial, which I will get to in a moment. That is different from Federal jurisdiction [119] substantial.

And finding it substantial you would then convene a three-Judge Court.

There is, your Honor—and we agree—

THE COURT: Have there been litigations where this multi-step process has been used, a one-Judge Court handl-

ing some of these issues and then if it decided the other issues had to be approached convening a three-Judge Court?

MR. ALBERT: Yes, your Honor, there have. There are two lines of cases some of which, I should add, follow Florida Lime, to not make that issue dispositive: There are the severability cases, Hobson against Hansen, followed by other District Courts, which sever off in convening a three-Judge Court those issues which are not necessary for the three-Judge Court to resolve.

THE COURT: But they convene the three-Judge Court first. But have you got cases where they went the other way, the District Court severed and made its decision as an individual Court, and then left matters for [120] subsequent determination by the three-Judge Court?

MR. ALBERT: There are two such cases. There is a Supreme Court decision written by Justice Holmes, Ex Parte Hobbs, in which there was a dual establishing on rates established by the Commissioner of Insurance in Kansas.

THE COURT: And that case has never been called into question?

MR. ALBERT: That's never been called into question. The decision by Justice Holmes upholds the way of proceeding.

More recently, more recently there was a decision by then-Judge Stewart, now Justice Stewart from the Sixth Circuit, in Chicago, Duluth and Georgian Bay Transit, where the single Judge, Judge Stewart, resolved the state law issue, and he did so in favor of the Plaintiffs, so no three-Judge Court was convened. That procedure was cited by the United States Supreme Court in Idlewild Bon Voyage Liquor Corp. in 1962 with apparent approval. That was not the [121] issue in Idlewild, but it was a compare.

In Idlewild the single Judge acted improperly in abstaining and disposing of the case that way. If one looks to the decisions relied on by the State for the necessity of hearing both together—of course Florida Lime is the main deci-

sion there—it's quite apparent that what the Court was facing in that case was the question of, one—the initial question was whether it had jurisdiction; that depended on whether the three-Judge Court had the power to decide both Constitutional and non-Constitutional issues in the case. The Court said yes it did, in no uncertain terms.

And if you look at the choices—there was a dissent by Justice Frankfurter joined by Justice Douglas in it—the Court said if the three-Judge Court doesn't have such power, in that case it must be heard entirely by a one-Judge Court, then we will have one-Judge Courts who decide the statutory grounds against the Plaintiff issuing injunctions on Constitutional grounds, very flatly in violation [122] of the statute, which it clearly is.

Justice Frankfurter in dissent said "I don't find my solution very satisfactory, I don't find the Court's solution very satisfactory; under my solution there will be a whole category of cases in which single Judges will be issuing injunctions on Constitutional grounds."

It's very clear that the issue faced by the Court in that case was the question of whether the three-Judge Court must decide all the issues before it once the case is before it, or may, has the power to decide and then go up on appeal.

And the answer there clearly is yes, for reasons that are quite obvious. Once the three-Judge Court is convened, it would be foolish not to allow it to decide at least issues which require a unitary hearing.

Subsequent cases, after Florida Lime—that's Hobson against Hansen and cases like that—make very clear that the three Judges do not have to hear those issues which are discrete and severable in the sense [123] that we talked of.

I think it plain that our two claims here are discrete and severable, though they form part of one case only in a pending jurisdiction case.

There is no authority whatsoever holding this procedure improper, holding the one Judge deciding the non-Constitutional issue improper, and the reasoning certainly in Florida Lime, confirmed in Chicago, Duluth I think is the case, certainly doesn't in any way indicate that one way may not do that, which one Judge may not do, he may not issue an injunction on a Constitutional ground. We agree with that of course.

It may be said under this procedure that Plaintiffs have a great deal of latitude in posturing a case so they have one Judge or three Judges. Plaintiffs traditionally and always under the rules have a great deal of latitude in so doing by the very fact that they choose the forum, the timing, they choose the motions they make.

Furthermore even under the three-Judge [124] procedure Plaintiffs by merely casting a claim, a Constitutional claim in the terms as applied, as opposed to direct attack on a statute—it's clear in those cases that a three-Judge Court is not required.

There is a progeny starting from Ex Parte Bransford in 1940, which is also an answer to the declaratory judgment point.

It is true that a declaratory judgment has inhibiting effects, but so does an action for damages where a Constitutional provision is held—I'm sorry, a provision is held to be unconstitutional. The inhibiting effect of that is equally as great, and so is the res judicata effect.

The situation we think here for the single judge deciding the dispositive claim is particularly compelling where we have multiplicity of Plaintiffs, where we have a group of Plaintiffs joining in one claim and we have only some of those Plaintiffs bringing the additional three-Judge Court convening claim.

For example, if it is found by your [125] Honor that there is independent jurisdictional basis for the claims of the Plaintiffs from New York City who don't have a con-

stitutional claim, they only have a statutory claim, it's quite clear that, one, those Plaintiffs could have brought that claim here alone, and there would be no discussion of a three-Judge Court; so empowering the Plaintiffs to do this, to shape their complaint in such a way, is hardly offensive to what goes on every day. In addition to which even at this stage if your Honor found that their dispositive claim had an independent jurisdictional basis, because of the attendant delays in three-Judge Courts, they would, it would seem to us, have the right to proceed before your Honor alone.

To be sure, your Honor, if he convened a three-Judge Court in the Nassau County case could hold that decision, obviously. My point is that there is a great distinction between these claims which does warrant, it seems to me, an allocation of judicial manpower consistent with that. The functional waste involved in having a three-Judge Court [126] decide, come together to decide solely the non-Constitutional claim, which would be the case here at first at least, it seems is a waste of judicial manpower.

THE COURT: But in any event your position is that if the Nassau people brought an independent suit there would be no three-Judge Court there?

MR. ALBERT: That's also—that's very much our position. I am only going into this, your Honor, on the assumption that the cases don't mean what we think they mean and we are wrong. That's exactly right.

FF. Transcript of Proceedings of April 23, 1969 Before Judge Weinstein (Testimony of Joseph H. Louchheim) (Document No. 61)

[At Page 134]

DIRECT EXAMINATION

BY MR. WEINBERG:

Q. Would you state your present position? A. I am Deputy Commissioner in the State Department of Social Services, in charge of New York City affairs.

Q. Would you give your educational background? A. I have a B.S. in Economics from the Wharton School of Finance and University of Pennsylvania, and a degree from the School of Social Services Administration, University of Chicago. A J.B. degree from the University of Chicago, School of Law.

I am a member of the New York Bar, but not a practicing attorney.

Prior to my present position, for a period of three months, I was commissioner of the City of New York, Department of what was then known as Welfare. Prior to that, for two years, I was the First Deputy Commissioner of that Department.

I have been Deputy Commissioner with the [135] Department of Real Estate, in charge of relocation for the City of New York.

I held positions with the Federal Government previous, with the State Department of Social Welfare and Deputy Commissioner in charge of Institutions and Agencies.

I have been a part-time instructor at the Columbia School of Social Welfare and full time assistant professor at the School of Social—they changed the name—School of Social Workers, University of Pittsburgh.

Q. Do the duties of the Department of Social Services of the State include the general supervision of the whole welfare or Social Services Agencies within the State? A. It does.

Q. Have you had occasion to familiarize yourself to some extent to the practice in that regard in the Department of Social Services of the City of New York and Nassau County? A. Only the City of New York.

Q. In the City of New York, are the names of all welfare recipients electronically data processed by computers? [136] A. I don't know if the name is, but the case identification is.

Q. And the checks are processed through electronic data processing? A. That is correct.

Q. In your estimation, how long would it take to adjust the payments received by those welfare recipients to comply with the mandate of this statute which goes into effect July 1st? A. I have no great expertise in this area than Commissioner Goldberg, but based on previous experience which Mr. Goldberg did have in which he did do a recomputation of all budgets in the City of New York in October of 1968, I agree with his statement that it takes between six weeks and two months.

Q. If the statute were to be invalid between now and July 1st, how long in your estimation would it take the City of New York to readjust its program back to continuing the present level of grants? A. Well, some of the local welfare districts, local welfare centers in the City of New York, have ABC, Automatic Budgeting Computation, and of course it would be easier in those.

I checked with our experts in EDP and I think a [137] great deal would depend upon what time the shift in signals came. But if, as Commissioner Goldberg indicated, what they might do with the tape is modify the tape and make changes.

On our calculations, we believe that only four-tenths of one per cent of the cases now receiving public assistance in New York would have an exact same grant under the 131A as they were at the present time. If that estimate is correct, there would be 99 per cent changes.

And therefore, it would seem to me what you would do—I am not an expert—but is to set up a new tape and then

what you could do is use the old tape if there was a change which would not involve the erasures of the old tape.

Q. Would there be any additional expenditure in keeping the old tape, to the best of your knowledge? A. I wouldn't know. Storage charge? I don't know what you mean.

Q. If the old tapes which gave the present level were to be run through the machines, then would there be any delay in processing the applications of welfare recipients at the present level? A. No, except certain changes will have to be made [138] in the old tape to show any change that occurred during the months period.

Q. At least they could receive the check they had been getting prior to the institution of the statute? A. If my information is correct from the experts in Albany, the answer is yes.

Q. In the event that the statute was declared invalid, the Department would have the duty of notifying the 67 welfare districts throughout the State to continue the present formula? A. Yes.

Q. How long would it take to provide such notice? A. In New York City it would just take one minute. I would call Commissioner Goldberg immediately and follow up with a formal letter.

Q. To the best of your knowledge, how long would it take in the other districts? A. Certainly less than twenty-four hours.

Q. If local districts did not promptly comply and go back to the old payments on the assumption that the statute were to be declared invalid, would the State have a supervisory responsibility and the power [139] to step in on a situation like that to assure that every welfare recipient got whatever he was entitled to? A. If I understand your question correctly, you are saying that as it stands now is each local welfare district required to implement 131A, the answer is yes, and there would be supervision by the State to see that was done.

Q. Suppose on June 1st you were notified that 131A was declared invalid by this Court or any other court for that matter and you notified X County or City and it became evident they weren't taking steps to comply with the mandate of that court with the statute, would the Department of Social Services have the power to step in that situation and insure compliance completely? A. Yes, or penalize them for non-compliance, yes.

Q. We heard testimony from Commissioner Ginsberg and Commissioner Goldberg earlier today to the effect that there has been—actually from Commissioner Goldberg—there has been increasing anxiety on the part of welfare recipients because of the imminence of this change.

Incidentally, is it a fact that every welfare recipient is going to receive a reduction as a [140] result of the implication of it? A. Again, the research department has made studies with regard to the effect of 131A, both on upstate New York and on New York City.

As far as upstate New York is concerned, there estimate is, are that families—the families who will receive an increase based on 131A amount to 49 per cent. Families receiving decreased amounts to 51 per cent—which was the aim of 131 for upstate New York on the basis of flat grants. Some would benefit and some would not.

As far as New York City is concerned, the percentages are different and the reason for them being different is the upstate figure was based on the sole recurring grant. In New York City both the figures that the City put out and our calculations in making the calculation we included the cyclical grant which, as Commissioner Ginsberg pointed out, was $100 per year per family or $400 for a family of four. So that what we did take was family of four—we took the new recurring grant under 131A and compared that with the grant that the family would have gotten under the old schedule which New York City was FA-1, and then we added the $400 across the board for different sized [141] families.

Our calculations were, and they differ from those that were submitted by Commissioner Goldberg—the Commissioner, Commissioner Ginsberg said about 80 per cent would be adversely affected—and according to our figures 41.5 per cent would receive increases, 58.1 per cent would be decreases, and there was no change in four-tenths of one per cent.

THE COURT: These percentages, are they families or individuals?

THE WITNESS: Based on families.

BY MR. WEINBERG:

Q. You had some years of experience in administering Social Service and dealing with welfare recipients, have you not? A. Yes.

Q. Has it come to your attention, since the enactment of this statute, that there has been any greater anxiety on the part of welfare recipients than there was previously? And if so, could you document that. A. No. From my personal knowledge, I haven't any information in that regard. But certainly the persons living on public assistance always have anxieties. [142] Living itself is a difficult proposition. There are changes all the time. Cyclical grants benefit some and harm some. There was an anxiety when that went into effect. I am certain there was anxiety when there were two changes made in the medical assistance law.

Now, as I came here I saw the big group meeting, rallying in front of City Hall, and certainly there is anxiety.

I think the fact that there are welfare rights group, and they get the welfare recipients to join them in a common cause, and the welfare recipients may feel that there are people with the same difficulty in meeting their needs as they have—I think to some extent it may have a therapeutic value.

Q. In your estimation, does the thought of litigation, which leaves an uncertainty as to whether or not the new statute is going to go into effect, lessen or heighten that anxiety? A. I think it would be the same with the welfare recipient as it is with Commissioner Goldberg, he wants to know what—

Q. If the question was still up in the air, so to speak, as a result of an order of a court which [143] left the question unresolved, would that heighten the anxiety or lessen it? A. That I couldn't tell. Some might say it would lessen the anxiety and increase the depression—I don't know. I am not an expert on that.

Q. You say that welfare recipients are more or less realistic when it comes to financial matters than the average person? A. I think they have to be realistic in order to survive on the limited budget they have. Certainly, included in this are individuals, because of age or incapacity, are unable to take care of themselves and in those cases the local Department of Welfare brings in homemakers and advises them about home economics and so forth, but I think the majority on public assistance are very careful with their pennies and of necessity have learned to squeeze every penny.

Q. Has it come to your attention that there are more welfare recipients requiring psychological guidance or psychiatric assistance since the announcement of 131A? A. That has not come to my attention.

MR. ALBERT: I object. I think we are going far afield.

[144] THE COURT: I think we can bring this to a close.

MR. WEINBERG: One or two further questions.

THE COURT: Go ahead.

BY MR. WEINBERG:

Q. Commissioner, isn't it a fact that in 1968 the State Department of Social Services took steps to comply with the Social Security Act provision—as you know was an issue in this case—by raising the standard in order to reflect fully the adjustment in the cost of living during that period? A. Yes. The State Department of Social Services did issue a new schedule under date of August 23, 1968, based on the cost of living as determined under the May, 1968 survey which they made. This is in conformity with the Social Service law which says that there has to be recalculations every year if the cost of living has increased above

a certain percentage. And that was put into effect on August 23rd—at least an administrative letter went out and each local Department of Social Service was required to make this modification within nine months after August 1st, so that all [144a] of them will have done it by May 1st.

As I said in my testimony earlier, New York did that as of October 1968.

[145] Commissioner, I show you this document. Will you tell the Court whether that is the document you were referring to a moment ago in your testimony? A. Yes, this is Administrative Letter 68P.W.D.525, August 23, notifying the Commissioners, local Commissioners of Social Service, of the change in schedule, and that this should be done eight months—excuse me, not nine months, eight months after promulgation, which does make it May 1st.

And this first one is a receipt from the Health, Education & Welfare showing that we did submit these new standards of assistance, and it was approved by them under date of September 11, 1968.

MR. WEINBERG: I have a copy of that for counsel.

THE COURT: Yes, offer it. Defendant's Exhibit—

MR. WEINBERG: I offer that in evidence as Defendant's Exhibit A.

THE COURT: Mark it, please.

(Administrative letter dated August 23rd marked Defendant's Exhibit A in evidence.)

MR. WEINBERG: We have no further questions.

[146] MR. ALBERT: Your Honor, I believe this was described as a two-part exhibit, or two letters. I only have one letter, it appears.

MR. WEINBERG: Well, it may be a Xerox copy. Doesn't that contain the Health, Education & Welfare letter?

We have no further questions at this time.

CROSS EXAMINATION

BY MR. ALBERT:

Q. Mr. Louchheim, was it your testimony on direct that based on your conversations with experts in Albany in com-

puter programing in regard to the Public Assistance Administration that it was entirely possible for steps to be taken in total preparation for implementation of the cuts without any irreverisble step to be taken, that is, it could be reversed–preparing full steam ahead for implementation, this was fully reversible at any time in June? A. I didn't say that in my–in my testimony.

Q. I'm sorry, would you clarify that. A. I believe in my direct testimony I did say that the experts up in Albany agreed with Commissioner Goldberg that if he had the guidelines he could do it between [147] six--six weeks and two months. That was my first statement.

Q. Take the steps necessary to implement, yes? A. Yes. Secondly I said that now what–what would be done if there was a reversal would in part depend upon at what time the whistle was blown. I said that I was given to understand that if there were, as our statement indicated, approximately 99% changes based on 131, that probably what they would do was run a new tape instead of trying to modify the existing tape, in which case they could use–they could continue the old tape and use the old tape that went back, with of course the proviso that any modifications that were made in the case load between the months–the last month that they used the tape and the next month would be taken into consideration.

Q. Well, presuming those modifications would be rather few, due to the fact that most case workers would be giving their time to new tapes, to recomputing the budget for each case–is that correct, 99% of the cases? A. Yes.

Q. So that by saving the old tape–how long does it take to put the old tape back into the machine? A. I haven't the slightest idea.

Q. But presumably from your testimony that's a [148] rather–not a very significant amount of time, so long as you have the old tape? A. It is my thought–

Q. So then it is your testimony that full steps could be taken now preparing to implement, and as long as you saved the old tape those steps would be reversible by using the

old tape? A. This is what I am given to understand. With the modifications, as I pointed out, making changes in the old tape based upon changes which had occurred since the last tape was used.

Q. Is it your understanding that there is a tape for each case? A. My understanding very definitely is that there is not a tape for each case.

Q. Can you describe perhaps what this tape represents? A. I can only do it in very general terms, and that is that it is the—the tape consists of a roll of the individuals who are eligible for—to receive the next semi-monthly installment, and that what that does is have on it the amounts and the identification.

Q. Of the individual family— A. That's right.

[149] —in the ADC program and ADC unit, it would? A. If—whether or not it was on tape for ADC or whether or not all are combined, I do not know.

Q. Are you saying that one tape represents the entire case load of the city? A. I'm sure it's more than one tape, but whether or not that the tapes which they used are by categories or not I do not know. But the tapes are available.

Q. How often is there a mandatory investigation of budgeting of clients for verification of their right to receive the same thing they were receiving before under state law? A. It depends upon the category.

Q. Aid to Dependent Children category? A. ADC, there has to be a minimum visit I believe every three months and reverification every six months.

Q. So that for the bulk of cases in that category there is not a rebudgeting more often than every three months? A. Recent. Recent.

Q. Is it fair to characterize the legislative changes as a simplication in budgeting? Is it easier to budget a family under the new schedule than it was under the old one? [150] A. Very definitely.

Q. A substantial simplification? A. It's a simplification which is in accord with the recommendations and the regulations of HEW, yes.

Q. So the time involved in budgeting in a given case under the new schedule is far less than the time involved in rebudgeting a case under the old one? You have to know much less information, do you not? A. Well, it isn't so much the information that you have to know as the chance of making error less. In the old system what you had to know was the age of the oldest child plus the number of people in the family plus the rent and any other special items.

Q. And– A. Now you have to know the number of the family–in the family and the rent, so what you are stating is the age of the oldest child.

Q. And it is your judgment that under the new simplified system it will take six or eight weeks to budget all the ADC families in New York City? A. I believe it will take just as long to budget under the new system as under the old, and it has been demonstrated that it can be done in between six and eight weeks in the old manner. So it certainly should not take long.

[151] Q. Even though the old system is far more complex, it is your testimony that it will take the exact time under the new one? A. I said no longer.

Q. If one were to going rebudget from the new system each family in New York City would that take about six weeks too? A. If one was to what?

Q. Assuming we had the implementation of the new schedules and we suddenly were going to rebudget the entire case load for the old schedules, putting aside the old tapes now for the moment, please, would that take approximately six weeks, or eight? A. If you–if you were not going to use the tapes?

Q. If you are putting aside those of the old tapes, that's correct, you are to make up a new budget for each of these families? A. If you took away the tapes you would still have the information which the caseworker had, which he submitted to E.D.P., on which the old tapes were made.

Q. Yes, which you now have towards doing the new system, of course. But Mr. Louchheim, it's your testimony

to implement the new system in New York City will take six to eight weeks? [152] A. That's because you would have to recalculate the budget. If you went back to the old system a caseworker would have in his record what the–what the old budget was, and therefore the only changes you would have to make is where there was a change in the family situation during that month, one-month period or two-month period.

Q. The figures that you used about the percentage of increases and decreases upstate, does that include Nassau County, Mr. Louchheim; when you say upstate do you mean non-New York City or do you mean only really upstate? A. With your permission, your Honor–

THE COURT: No, I understand what you mean.

THE WITNESS: No, with your permission–

THE COURT: Well, go ahead.

THE WITNESS: –could I modify the original testimony?

THE COURT: Yes, you may.

THE WITNESS: This wasn't–the figures that I gave of 49% and 51% was not for all of Upstate New York.

Q. I'm sorry. A. It was only for Upstate New York which had the same [153] budgetary recurring grant as New York City did. Those came under what is technically called Schedule SA-1. And SA-1 applied to New York City and the following counties: Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester.

This 49%-51% didn't include Herkimer or some of the smaller counties.

Q. And do those figures refer to the ADC case load or the entire public assistance case load? A. They refer to the entire case load–

Q. Including all the other categories? A. –which, as you heard from the direct testimony of Commissioner Ginsberg and Commissioner Goldberg, is the largest portion of the cases in New York City.

Q. In ascertaining these figures you totally excluded any amount of money people were receiving for any special grant? A. I did not. As I indicated in my direct testimony–

Q. I'm sorry. A. –that in doing it for New York–

Q. No, I'm talking about it for Upstate, these figures are Upstate figures? A. These only deal with the recurring grants.

Q. That is you excluded, then, all amounts [154] received for special grants? A. And as far as New York City is concerned when we included the cyclical grant, which includes Item 5 and 6, or Code 5 and 6, Code 5 being household supplies, Code 6 being clothing, that 5 and 6 when it was a special grant involved 90% of the total amount of monies spent by New York City on special grants.

[155] Q. The $100 Cyclical? A. The Five and Six, which was then made into the Cyclical.

Code Five and Six before the Cyclical involved 90 per cent of all the special grants given in New York City.

Q. Indeed wasn't the reason for the special Cyclical the fact that Code Five and Six grants were running rather high; that was indeed the motivation for the Cyclical? A. I think since the declaration–since the demonstration project was initiated by New York City and approved by us–I think it's a question for you to ask New York City.

Q. I'm sorry, I didn't hear your last answer.

THE COURT: All right, go on to the next question.

Q. In making these calculations of percentages you haven't gone further into the amount of increase or relative amount of decrease suffered by the various groups, have you? A. Yes, I have. Did you want–

THE COURT: Yes, let me have them, please.

THE WITNESS: Again for increases, [156] increases of $1.00 to $199, New York City 31.5%, Upstate–when it's upstate I just mean the counties I enumerated–Upstate 35.5%. Increases of $200 and over, 10% in New York City, 13.5% in the upstate counties.

As for decreases: Decreases of $1.00 to $199 of 27.2% in New York City, 26% in the upstate counties.

Decreases of $200 and over, 30.9% in New York City, 25% in upstate.

And no change, is the same for the increases, there is no change in any increase.

THE COURT: Well, do you think that those upstate figures are typical in all the counties, that is, would this gross figure be sufficiently typical to give us an indication of what the Nassau situation is?

THE WITNESS: The Nassau situation is included in this.

THE COURT: I understand.

THE WITNESS: Oh, I see. You mean is Green, Monroe, Suffolk, Ulster and Westchester different from Nassau, which would affect it?

THE COURT: Yes.

[157] THE WITNESS: I don't think I could—I don't think I could answer that. Certainly if this is done, as I am certain it was, on a number of cases, since Nassau, Suffolk and Westchester and Monroe, where the living conditions are approximately the same, it would seem to me there wouldn't be a great difference. Greene might—Greene and Ulster might be slightly different.

Q. Mr. Louchheim, let me ask you an overall question: Do the cuts as proposed represent an overall savings, the amount to be spent on welfare, for the present case load size per person throughout the State of New York, not getting into who is benefitted and who is hurt? Is there an overall dollar saving per person based on the present expenditures per person in the State of New York? A. Certainly there is a dollar saving.

Q. Is that a substantial savings? A. It's substantial. I don't know what your definition of substantial is.

THE COURT: Well, how much?

THE WITNESS: Everything—everything in Welfare is substantial.

[158] Q. How much do you save per person, or— A. I don't know the—first of all, the package which you saw in the—in the papers, for example in the State they talk about a figure of $128 million.

THE COURT: This Court is not advised on that point.

THE WITNESS: Now, from the standpoint of only part of this, this cut—and as I indicated, there are some that benefit and some that decrease.

Q. Yes, I understand. A. Let me also say, since you asked the question, that you—the question was raised in regard to moving expenses, in regard to other expenses, which are special grants. And I believe it was Commissioner Goldberg who said that he believed that there was something that may happen on that, but he hadn't been advised officially.

I can say to you that the Department and the Governor's office have submitted to the Legislative leaders a proposition which they believe or which we believe the Legislative leaders will act upon favorably, which will permit the purchase of service for certain items, which can be done by rules and regulations of the State Department of Social Services and the State [159] Board of Social Welfare, which doesn't involve an increase in the recurring grant in dollars but does permit purchase of say moving expenses, does permit the including in the rent, the rent deposit, and sometimes the breakage fees which are included, which are demanded by the Housing Authority, and so forth.

It also would naturally continue purchase of day care services, homemaker services and other services.

Q. Anything that can be delivered in the form of a service might be saved if what, the Legislative leaders accept this proposition? A. It does not need legislation.

Q. But you just said it was being discussed with the Legislative leaders. A. I said it was being discussed with the Legislative leaders and we have reason to believe there will be favorable action on some of the special items. And certainly—

Q. Mr. Louchheim, is it— A. And certainly—

THE COURT: Excuse me. Don't interrupt.

THE WITNESS: And certainly on the Medicaid there can be transportation for medical assistance. The proviso is that it [160] has to have prior approval, and for a person who goes regularly to a clinic there can be prior approval not on any given visit but on a block of visits.

THE COURT: Is it contemplated that there will be some kind of an administrative order if this change takes place?

THE WITNESS: It will be rules and regulations which the Department and the Board put out regularly.

THE COURT: And when is it contemplated that this will be done, if it is going to be done?

THE WITNESS: Well, your information is just as good as mine, your Honor, but the Legislature is planning, we are told, to adjourn either Thursday or Friday, granted they meet the clock, and so forth. As soon as we know what the legislation is, because, as you know, amendments are being considered to 131A. As soon as that is done we can put out immediately–

THE COURT: I see.

THE WITNESS: (Continuing) –information [161] to Commissioner Goldberg and others to implement the program.

THE COURT: Well, your expectations would be within a week or two, then?

THE WITNESS: Definitely.

Q. Mr. Louchheim, I ask you–I know it is very late in the day–just a few questions I think for which a yes or no answer would be sufficient: Is it a fact that however the recent cuts are distributed, cost of living changes was not the basis for them?

MR. WEINBERG: Objected to. It calls for a conclusion of law.

MR. ALBERT: No, it doesn't. It's very factual.

THE COURT: Overruled. Excuse me, I will rule.

MR. WEINBERG: It's awfully irrelevant to the question of the temporary restraining order, I should think.

THE COURT: Let the witness answer if he can. If he can't he will say so.

Read the question.

MR. WEINBERG: It's irrelevant, you Honor.

[162] THE COURT: Yes.

(Last question read.)

THE WITNESS: Do you wish me to answer, your Honor?

THE COURT: If you can.

THE WITNESS: They were based on a cost-of-living increase. They were based on a cost-of-living increase which was promulgated August 23, 1968 on the basis of which SA-1 was promulgated, and what this new legislation does, it takes the schedule of SA-1 and what it does is make a flat grant; instead of having eight or nine items let's say for a family of four, based on the eldest child, what they have done and what we did was we found out what the median age was for the child—the oldest child of the family of four, we also found what the mean age, and we found that the mean was higher than the median age, therefore we applied the mean age, and for a family of four the mean—the mean age of a child was between—was ten or eleven.

I may say that the median age was 9.6, [163] but we applied the 10.1, the 10 to 11, which gave for a family of four $191.00.

And then what we did was we adjusted that upwards to $208 for New York City and $183 for the rest of the State. And those whose children, whose oldest child was less than eleven gained, and those whose child was over eleven were adversely affected.

Q. On the regular recurring grant they gained? A. On the regular recurring grant.

Q. Yes. A. And according to the percentages that I gave you before, as far as New York City was concerned it included the $100 per person Cyclical.

Q. So it was based on cost of living insofar as it was based on the previous figures, which didn't themselves—

A. It was based on cost of living, it was determined—

THE COURT: Excuse me, gentlemen.

Do you want to take a break for a few moments?

THE WITNESS: Not unless your Honor—

THE COURT: Then don't answer before he asks the question.

[164] Q. It was based on cost of living insofar as it was based on a previous adjustment which you say reflected cost-of-living changes at that time? A. It was based on a cost-of-living adjustment which was made subsequent to January 2, 1968.

Q. And it made an adjustment to that adjustment? A. No, it was based on that adjustment.

Q. It changes that adjustment, wouldn't you say that? A. Based on that adjustment.

Q. Is it a fact that when New York State Department of Social Services has made changes such as the one last August local Social Services districts are usually given up to nine months to implement cost-of-living adjustments? A. That—I think I said nine months originally, but in your scene I think it was eight months.

Q. Eight months is the usual time allotted? A. This was the time allotted, yes.

[165] Q. But the document you mentioned that was submitted to HEW was a notice to HEW of the change you had made in the State plan last August, is that correct? A. Correct.

Q. It represents nothing more than that—correct?

MR. WEINBERG: I'm sorry, I didn't hear that.

Q. Did it represent anything more than that?

MR. WEINBERG: I don't know what that question means.

THE COURT: Read the question.

(Last question read.)

THE COURT: Can you answer it?

THE WITNESS: Yes.

THE COURT: If you can—

THE WITNESS: Yes, it represents the State plan, and the State plan is the basis on which all social services must be administered in the City of—in the State of New York. The State plan includes our State plan material, and naturally it also includes our law, so it's nothing—it's—it's the basic document under which we operate.

[166] Q. I understood it was submitted to HEW as part of the State plan, just like your recent amendments were submitted to HEW now and are being questioned, is that correct? A. We received a reply from HEW regarding 131A, yes.

MR. ALBERT: May I be indulged just for a half a minute, your Honor?

I have no further questions, you Honor.

THE COURT: Yes, do you have any redirect?

MR. WEINBERG: No redirect, your Honor. I would like to be heard on the temporary restraining order.

THE COURT: Well, I'd like to ask the witness, since neither of you seems to want to, what the reply was from HEW with respect to this new statute?

THE WITNESS: I'd be glad to give you a copy of the letter, sir.

THE COURT: If you have it here I'd be delighted to see it.

MR. WEINBERG: Here it is, your Honor.

THE COURT: All right, mark it in [167] evidence and supply copies—

MR. WEINBERG: I offer it in evidence.

THE COURT: (Continuing) —to your adversary.

Stay here a moment while I look at it.

THE WITNESS: Certainly.

(Letter from HEW marked Defendant's Exhibit D in evidence.)

THE COURT: Well, has the State supplied the Department with additional data as requested here?

THE WITNESS: The State Department of Social Services has not replied. They have made suggestions to the Governor's Office in regard to what could be modified about the rules and regulations, and so forth.

THE COURT: I see.

THE WITNESS: And as soon as the Legislative session is completed there will be a reply.

THE COURT: When do you think that will be, again within the space of a week or two?

THE WITNESS: I'd say that it could be done within at the most two weeks. I [168] personally believe it can be done within a week after the Legislative session is terminated.

THE COURT: And then–

THE WITNESS: Material has been drafted, but they have to see what's happening.

THE COURT: Yes, and then on the basis of that HEW would be able to rule on 131A?

THE WITNESS: Yes, your Honor.

THE COURT: But it's your feeling based on your discussions with your associates in Albany that it's possible for the City without unduly straining its administrative processes to make appropriate changes which would permit it to comply with the new law as amended in the last month and at the same time retain sufficient of its records so that it would be able to change back to the old system relatively quickly, I gather in the space of weeks.

THE COURT: Subject to ~~thse~~ modifications or changes in the interim?

THE WITNESS: And two other things: If this goes– 131 goes into effect, and at [169] the–after a couple of months it is determined to be unconstitutional or against HEW, it can be changed. Some people, as I have indicated, approximately, 50 per cent outside the City of New York, will have benefited in regard to the current grant.

THE COURT: Yes. But it's going to be hard to get that money back?

THE WITNESS: There will be no effort made to get it back. And those who get less will get the adjustment.

Now, in addition to that–

THE COURT: So I take it–I don't want to interrupt you, but I want to follow this: I take it then that if you go ahead with the changes and then we declare the statute unconstitutional–by we I mean the Federal Court system, not me necessarily–the total expense to the State may be substantially larger because they will have paid out these extra sums, which are really not refundable?

THE WITNESS: On the basis of your if's the answer is yes, I agree with you.

[170] On the other hand, as I think I indicated, we have no reason to believe and we have—our experts are definitely of the impression that we do comply very definitely with Section—I have got the wrong letter here—with Section 1202(a) 23, and that, as you will see from the letter which was given to you from HEW, there are other changes which can be rectified either by a change in legislation, which is being contemplated, or by rules and regulations.

And the real question which it seemed to me that this was about was this 402(a) 23, and in my direct testimony I tried to indicate—and in my cross-examination—that we did raise standards in accordance with cost of living.

THE COURT: Thank you very much.

MR. ALBERT: Your Honor, may I just put two very quick questions to the witness?

THE COURT: Yes.

MR. ALBERT: Thank you.

[171] CROSS EXAMINATION

BY MR. ALBERT: (Cont'd)

Q. As you said, the adjustments reflect and are based upon cost-of-living adjustments of August 1968, is that correct? A. That is correct.

Q. So they are adjustments which meet the full needs making up the welfare budget, they don't reflect, in short, a decision on the part of New York to pay better percentage of need of people rather than full need as defined in your amounts used—in your amounts? A. I'm not sure I understand the question.

Q. The adjustments based on the August 1968 cost-of-living adjustments, the recent welfare amendments based on those cost-of-living adjustments reflect, as you said, those adjustments—indeed that's why you believe they comply—and hence they represent an assessment by the Legislature of the needs of people in light of cost-of-living

changes? A. The SA-1, which was promulgated August 23, 1968, was based on cost of living, which was surveyed on May of 1968 by our Department, and therefore it is based on that increase. As I indicated, the schedule under 131A was an adjustment of SA-1 to be based on a flat [172] grant in which you would use the mean of the oldest child.

Q. But still continuing to pay the full need of people, as to how you define the amount? A. Yes, but certainly if the mean age of a child on this calculation, as I indicated, is 10 or 11, and some—some family has a child 20, they are not going to get what they did under SA-1.

Q. No, I certainly appreciate that. A. An age 5 person would get more.

Q. I appreciate that, of course. My second question is based on your experience with the procedure by which you submit a change to HEW and it raises questions with you; would you say that procedure is one that takes some period of time and consultation and discussion? A. This varies: Sometimes we can get much faster action from the Federal Government than the City can get from the State.

Q. And other times you can't? A. We have reason to believe, for example, as Commissioner Goldberg will remember, when they submitted the Cyclical Grant Demonstration Project we got a very quick answer. I believe that HEW is well aware of the [173] fact that this legislation goes into effect on July 1st, and if our answers to HEW are full and complete, which we believe they can be, and which we will send to them, as I have said to the Judge, within two weeks at the outset (sic) and I believe within a week, I believe we can get a very fast answer from HEW.

Q. Mr. Louchheim, what would you do if the answer from HEW in two weeks' time or a month's time was "We still don't see how that complies with 402(a) 23"?

THE COURT: Don't answer the question.

Thank you very much, Commissioner.

(Witness excused.)

* * *

Supreme Court of the United States

No. 540 --- , *October Term, 19* 69

Julia Rosado, et al.,

Petitioners,

v.

George K. Wyman, etc., et al.

ORDER ALLOWING CERTIORARI. Filed October 13 -------- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

as amended by order of October 20, 1969

Supreme Court of the United States

No. 540 -----, *October Term, 19* 69

Julia Rosado, et al.,

Petitioners,

v.

George K. Wyman, etc., et al.

ORDER ALLOWING CERTIORARI. Filed October 13, -------, 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar. The case is set for oral argument with No. 131 in which jurisdiction was noted today.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.